Supreme Court, U. S.
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MICHAEL RODAK, JR., CLER

80-369

No. _____

UNITED STATES SUPREME COURT

October Term, 1980

ALFRED AVINS, Petitioner,

v.

JAMES P. WHITE, Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

# PETITION

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## QUESTIONS PRESENTED

1. Whether the First Amendment and the rule of New York Times v. Sullivan protects a person in divulging confidential information to one he knows is not entitled to receive it.

2. Whether the head of an academic institution which applies for accreditation or other licensing thereby becomes a "public figure" as to matters connected with its licensing.

3. Whether an application for accreditation or other licensing of a school is a "public controversy."

4. Whether private comment not intended for public discussion is covered by the rule of New York Times v. Sullivan.

5. Whether an expression of an intangible evaluation in an accreditation or licensing report constitutes an "opinion" or "idea" which is constitu-

tionally immune from liability under Gertz v. Robert Welch.

6. Whether an expression of intangible evaluation in an accreditation or licensing report precludes the existence of undisclosed factual observations so as to be immune under the rule of Gertz v. Robert Welch.

7. Whether the Court of Appeals invaded the province of the jury in determining that the first and third inspection reports were non-defamatory.

8. Whether the failure of defendant to make timely objection at the conference called by the trial judge to consider the proposed charge to the jury constitutes a waiver of any error in submitting defamation claims arising out of the inspection reports to the jury under Rule 51 of the Federal Rules of Civil Procedure.

9. When a plaintiff obtains a

general verdict on two or more defamation claims, one of which was properly submitted to the jury and one of which was not, and defendant has made no request for a special verdict or interrogatories, may the court, either on its own motion or that of plaintiff, reduce the damages rather than ordering a new trial?

10. Whether quasi-negligence concepts of proximate cause apply to a claim that, in violation of due process and because of political hostility, a quasi-government licensing inspector manipulated the licensing process so as to remove the founder of a school from connection therewith.

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## REPORTS DELIVERED BELOW

The opinions delivered below by the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit are annexed hereto in the appendix.

## JURISDICTION

The judgment of the Court of Appeals was made on June 30, 1980, and the mandate issued on July 22, 1980. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. sec. 1254.

## CONSTITUTIONAL PROVISIONS

Amendment 1: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Amendment 5: "No person shall be . . . deprived of . . . property without due process of law . . . ."

Amendment 14: "No State shall . . . deprive any person of . . . liberty or property without due process of law, nor deny to any person within

its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Plaintiff, a sometimes law professor and dean, is, according to the Association of American Law Schools, "a unique figure in American legal education." (Brief in Ct. of Appeals, p. 5) He is one of the most conservative legal educators, politically. Prior to 1971, he "possessed an impressive academic background with numerous advanced degrees and many legal publications to his credit." (Slip op., p. 3) He is the only professional legal educator in recent history to start his own law school. In 1971, he founded Delaware Law School, the only law school in that state, and became its first dean. In 1974, when the school first applied for American Bar Association accreditation, plaintiff was Dean,

Trustee, professor, and a guiding influence in the school. By 1978, when the school became fully accredited, the plaintiff had involuntarily lost all connections or positions with Delaware Law School.

Defendant is a politically liberal legal academic. He is an employee of the American Bar Association with the title of Consultant on Legal Education. He has never founded his own law school, been a law school dean, earned a research doctorate in law, or written a legal text. Defendant is in charge of the administration of the accreditation process.

All but a handful of state supreme courts, and the federal courts as well, have delegated to the American Bar Association their governmental power of licensing law schools, so without accreditation or approval of A.B.A., graduates of

a law school cannot take the bar examination and become lawyers. Thus A.B.A. accreditation is a governmental-delegated license essential to the survival of a law school.

Plaintiff sued defendant for fraudulently manipulating the accreditation process of Delaware Law School with the intent of obtaining plaintiff's involuntary separation from D.L.S. in all of his manifold capacities. Plaintiff's theory was that defendant, and certain of his allies in the process, had deliberately delayed accreditation of the law school by false reports, and obstructions to plaintiff's presentation of the facts regarding the school, while at the same time campaigning among panicky parents and students frantic that the latter would graduate from an unaccredited law school and be unable to become lawyers, by leak-

ing confidential information and misinformation, derogatory to plaintiff, all conveying the message that the influence of plaintiff and his friends must be eliminated if the school were to be accredited in time for its first graduation. The defamation counts were based on some of the instances of false reporting and leakage of false information about confidential matters to parents and students. A further count, not appealed, was based on infliction of mental distress, resulting from the vandalism and threats of physical violence by hysterical students against plaintiff, a by-product of defendant's campaign.

The first inspection of D.L.S. occurred in January 1974. Defendant appointed himself as co-inspector. Violent quarrels erupted between defendant and his co-inspector on one side, and plaintiff and

the assistant dean on the other, about the inspection team's injection of their political preferences before a student audience, the team's attempt to force the expulsion from the law school of a student school newspaper editor for questioning A.B.A. accreditation procedures, and a team member's personal conduct towards female law students. In reprisal, the team's report about D.L.S. constituted an unremitting attack on all aspects of the school and plaintiff in particular. The report dragged in unrelated prior litigation brought by plaintiff and asserted that plaintiff started D.L.S. ecause he could not obtain another law teaching job. The report strongly suggested that plaintiff was an inferior law teacher. In its summary, the report asserted that plaintiff was only interested in minimum requirements and not

excellence. It stated that the most important deficiency was an academic ennui, or lack of intellectual spark prevading the faculty and students. The law school was denied accreditation because of the first report, and various readers thought the less of plaintiff because of it.

A second inspection occurred in May, 1974. Defendant appointed the inspection team but was not on it. The second report was much more favorable, although some deficiencies were still noted. Plaintiff was singled out for praise. Because plaintiff had been discredited before the Accreditation Committee and Council of the Section of Legal Education by the first report, he asked a nationally respected law professor, Victor Rosenblum, to appear before these bodies to testify about progress at D.L.S. that the latter

had seen on a visit. Defendant used his position to bar Rosenblum's appearance. The Accreditation Committee and Council not only turned D.L.S. down for accreditation a second time, but the latter also passed a resolution that D.L.S. was not making satisfactory progress under plaintiff's administration.

After the second refusal of accreditation, plaintiff frankly told a committee of Philadelphia judges and lawyers, whose children attended D.L.S., that political and personal considerations were motivating defendant and certain Council members in delaying accreditation. Plaintiff suggested that parents protest this to members of the House of Delegates whom they knew. A parent, Philadelphia Common Pleas Judge G. Fred DiBona, volunteered at his own expense to go to the A.B.A. Convention in Hawaii in August 1974 to

do this. While there, defendant leaked a great deal of confidential information and misinformation derogatory to plaintiff to DiBona, although A.B.A. policy prohibits divulgence of confidential information about a law school to students or parents. DiBona reported to the student body upon his return that because of political and personal hostility D.L.S. would never be accredited as long as plaintiff remained dean.

The second Council resolution had directed defendant to meet with the D.L.S. Board of Trustees to convey its views. On August 23, 1974, defendant arrived for the meeting. DiBona came to pick him up and went to lunch with defendant. Plaintiff and Assistant Dean Tovey accompanied them. Defendant discussed a variety of matters regarding D.L.S. there, including defendant's endorsement of DiBona as a

trustee. Defendant also repeated an accusation previously made to DiBona in Hawaii that plaintiff had been guilty of lying to the second inspection team about the existence of the U.S. Code Service in the library. During the first day of the second inspection, when the team librarian criticized plaintiff for not having these books in the library, plaintiff purchased them overnight and cured this asserted deficiency. Defendant falsely accused plaintiff of concealing the overnight purchase from the team to DiBona. The latter in turn told other parents and students. The subject of defendant's false accusation was confidential under A.B.A. policies. The book fraud accusation is the basis for the slander count.

Judge DiBona's constant reiteration of defendant's information that D.L.S. would not be accredited as long as plain-

tiff remained Dean created a deep impression on the panicky students. Plaintiff sought to refute this and stabilize the D.L.S. situation by getting A.B.A. Council or Accreditation Committee members to deny this. Defendant used his position to thwart plaintiff's efforts by sending the D.L.S. Trustees a fraudulent letter falsely accusing D.L.S. and plaintiff of violating Standards which were not violated, falsely accusing plaintiff of deliberately aborting the August 23rd Trustees' meeting and falsely accusing plaintiff of giving misinformation to local newspapers about him. Copies of these letters were sent to Council members, blackening plaintiff and destroying plaintiff's ability to obtain denials of Council members that plaintiff must resign. The student body became so unmanageable that on September 8, 1974, plaintiff was

forced to resign as Dean.

When the new Dean, Arthur Weeks, took over, plaintiff remained as a professor and Trustee. Defendant continued his campaign against plaintiff. On December 18, 1974, he wrote to Council officials suggesting without basis that plaintiff was threatening a lawsuit against them. A Council member, as a result, denounced plaintiff to the new Dean. Defendant expressed opposition to plaintiff's continued influence in the school as a Trustee to an inspector appointed by the Delaware authorities to determine whether it should receive degree-granting authority, and to a former A.B.A. president. Nevertheless, a majority of Trustees remained friends of plaintiff, to defendant's knowledge.

Defendant appointed himself as chairman of the third inspection team, which

came in January, 1975, and appointed as co-inspectors team members who had no prior experience at independent law schools dealing with boards of trustees. During the inspection, defendant continued to display strong aversion towards plaintiff. He suggested to Professor Feinberg that the faculty recruited by plaintiff was "stifling" because of its conservative political orientation and consequent lack of "intellectual ferment." Defendant inquired about faculty political views.

Each of the three team members wrote a different part of the report. A dean wrote the part lauding plaintiff as a teacher. Defendant wrote the part criticizing the Board of Trustees, and the summary. The summary recommended "appointment of an experienced, recognized and respected legal educator." This reiterated

views defendant had previously expressed to the Council and the Trustees themselves. Plaintiff was a board member, and in the context of the situation and the report it suggested that plaintiff did not fall into this category. The Council resolution specifically criticized the Board of Trustees. This backhanded criticism of plaintiff served as the basis for the third defamation count sent to the jury by the trial judge.

Many of defendant's cr iticisms of D.L.S. in the summary were fraudulent, misleading, and impossible of correction within a reasonable time. They criticized D.L.S. for practices permitted at other accredited law schools. They were designed to delay accreditation once again, and the A.B.A. again turned down D.L.S. in February 1975, at its midyear meeting in Chicago.

Nine students and two parents, DiBona and Mitchell Miller, accompanied Dean Weeks to the A.B.A. midyear meeting in Chicago. The students and parents were panicky. In violation of A.B.A. confidentiality rules, defendant had breakfast with Student Bar Association President Frederick Kessler, where he criticized plaintiff and other members of the Board of Trustees and leaked derogatory information, some of it false, about plaintiff to Kessler. Kessler in turn relayed this conversation to other students. Defendant also told the parents and students in a hallway gathering that the Board of Trustees had to be revamped, enlarged and broadened for accreditation. Upon their return, DiBona and Miller circulated a memorandum demanding, inter alia, plaintiff's removal from the Board of Trustees and its enlargement and restructuring.

Kessler and the Student Bar Association made the same demand. When plaintiff refused to resign as a Trustee, students slashed the tires of his car and invaded his classroom, threatening that they would inflict bodily harm on him.

On March 12, 1975 defendant spoke by telephone with President Clarence Moll of Widener College, then interested in acquiring the Delaware Law School. Defendant told Moll that to become accredited, D.L.S. would have to get rid of its existing Trustees and 3/4ths of the faculty. This could be done by a corporate takeover ("affiliation"). On March 19, 1975, defendant wrote a highly misleading official letter to the Chairman and Dean of D.L.S., wherein he asserted that D.L.S. was violating various Standards for Approval which were, in fact, inapplicable. This fraudulent letter dis-

couraged the Trustees from trying to correct any remaining deficiencies in time for the May inspection. A few days later, defendant again breached A.B.A. confidences by telling parent Miller over the telephone that D.L.S. had a 95% chance of accreditation if affiliated and less than 50% if it remained independent. This created a firestorm of student demands for affiliation to obtain accreditation in time for the first graduating class.

When Charles Maddock, D.L.S Trustee in charge of the accreditation drive, tried to get reliable information from defendant as to what he should do to get D.L.S. accredited, he got nothing. Maddock also made a last-ditch effort to save the independence of D.L.S. by asking defendant to appoint the dean of an independent law school as an inspector.

Defendant refused to do this and gave a palpably false reason. In fact, the chairman of the fourth inspection team told Maddock that he would be guided by defendant's views in deciding whether to recommend affiliation. Finally, the D.L.S. Board of Trustees voted to affiliate the school to gain accreditation. However, the affiliation had not been consummated by the time of the July 1975 meeting of Accreditation Committee, and defendant pressed the D.L.S. Trustee there to complete it before the A.B.A. met in August 1975. Thus, on August 8, 1975, Widener College obtained control of the D.L.S. Board of Trustees, electing a majority thereof.

From the outset, Widener officials did not want plaintiff at D.L.S., either as a Trustee or as a professor. Plaintiff was unsuccessful in voiding the affiliation in court. Plechner v. Widener

College, 569 F.2d 1250 (3rd Cir. 1977). A few months later, President Moll of Widener fired him as a professor, and the Widener College Board of Trustees removed him as a Trustee, thus ending plaintiff's connection with the school which he had founded.

Plaintiff sued defendant in Superior Court of the State of Delaware, and defendant removed the action on the grounds of diversity of citizenship to U.S. District Court for Delaware. After amendment, plaintiff's suit was based on a federal cause of action for manipulating the accreditation process in violation of plaintiff's due process and equal protection rights and a related state cause of action for unlawfully interfering with plaintiff's advantageous relations with D.L.S., both arising out of the same factual matrix, defamation, and

infliction of mental distress. As a single count the jury found for defendant on the interference and manipulation claim. It also found for defendant on the mental distress claim. But it found for plaintiff on the defamation claim, awarding him $50,000 in damages.

The Third Circuit affirmed the interference and manipulation claim verdict against a contention that the jury was misinstructed on causation. It reversed the defamation verdict and ordered a new trial.

## REASONS FOR GRANTING THE WRIT

Petitioner agrees with the Court of Appeals that the questionspresented are "important questions of defamation law" (slip op., p. 2) but submits that they were incorrectly decided from a First Amendment point of view.

Turning to the slander action for accusing plaintiff of book fraud before Judge DiBona, the Court of Appeals correctly held that the jury could properly have found that defendant was not authorized by the A.B.A. to divulge this confidential information to Judge DiBona, especially since defendant stated this in his own deposition. (Ct. of Appeals slip op., p. 15, Dist. Ct. op., pp. 7-8) Nevertheless, the Court of Appeals held that plaintiff must, on a retrial, prove that this leakage of confidential information was false under the standards of New York Times v. Sullivan, 376 U.S. 254 (1964). (Slip op., p. 16, 23) Times conferred extraordinary First Amendment protection on limited classes of defamation. The holding that leakage of confidential information not only enjoys First Amendment protection, but enjoys the extra-

ordinary protection of the Times rule, has far-reaching implications. It means that states cannot compensate persons injured by divulgence of confidential information if the information is true at all, since the First Amendment protects the right to speak the truth, and can compensate them for false and defamatory breaches of confidence, if public figures, only if they surmount the high Times barrier. This rule withdraws legal protection from confidential information of all sorts. Confidences are essential in many areas of business and private life. This Court has held that the First Amendment does not protect the right even to speak about governmental policies in breach of an agreement to keep information confidential. Snepp v. United States, 62 L.Ed. 704, 708 n.3 (1980). It should review this holding that a breach of

private confidences enjoys First Amendment protection.

The Court of Appeals holding that an application for accreditation of a school is a "public controversy" and that the executive of the school who makes the application injects himself into the controversy and thereby becomes a "public figure" for all matters relating to its accreditation also has broad implications. First, the actual controversy came about because defendant recommended against accreditation. A defendant cannot create the controversy which gives him protection. Hutchinson v. Proxmire, 99 S.Ct. 2675 (1979). Hence, the Court of Appeals held that the application for accreditation was itself the "public controversy." However, schools, colleges, and universities must not only receive, but also retain accreditation. An appli-

cation to continue accreditation would equally be a "public controversy." Thus, under this holding, all executives of schools, colleges, and universities throughout the country who seek to obtain or retain accreditation (and all do) are public figures in respect to all matters relevant to accreditation (which includes all matters relating to their jobs).

Moreover, accreditation is merely a form of government licensing, for without it graduates of the law schools cannot take the state bar examinations. Plechner v. Widener College, 569 F.2d 1250 (3rd Cir. 1977). Thus, the Court of Appeals reasoning applies with equal force to every application for a license or permit made to government for any business or occupation. While the accreditation of a law school affects its students, the licensing of an airline affects its

customers, the licensing of a lawyer or physician affects his clients or patients, the granting of a building permit or zoning permit affects tenants of the building, and any other government license affects those who deal with the licensee. The Court of Appeals' opinion has thus created a new class of public figures of indefinite extension and variation. The decided cases have not heretofore extended the concept of "public figures" so far. See, e.g., Dixson v. Newsweek, Inc., 562 F.2d 626, 628 (10th Cir. 1977). An application to government has not heretofore been thought to automatically confer "public figure" status. See Time, Inc. v. Firestone, 424 U.S. 448 (1976); Hutchinson v. Proxmire, 99 S.Ct. 2675 (1979). This extension warrants review here.

The holding of the Court of Appeals

that the Times rule governs private comment not intended for public discussion likewise warrants review. It stated that it was of public importance that discussion of accreditation matters be frank and full. (Slip op., pp. 21-23) It said that recipients of credit reports have less of an interest in them. However, a recipient of a credit report who proposes to lend money to the corporation which is the subject of the report has just as much interest in candidly knowing the financial status of the borrower as a parent of a student has in knowing the accreditation status of the law school where his son attends. The public importance of the free flow of financial information is illustrated by the many laws and regulations governing the raising of capital. Nevertheless, the Times rule has not heretofore been applied thereto.

There is a conflict among the Circuits regarding whether the Times rule applies to private defamation not intended for public discussion. The majority rule holds that it does not apply. For example, Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647, 649 (10th Cir. 1971) held:

> "a publication . . . which provides specialized information to a selective, finite audience is not a medium entitled to the extended constitutional protection provided by New York Times and its successor cases."

To the same effect, see: Hood v. Dun & Bradstreet, 486 F.2d 25, 29 (5th Cir. 1973); Grove v. Dun & Bradstreet, 438 F.2d 433 (3rd Cir. 1971), cert. denied, 404 U.S. 898 (1971); Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691, 697 n.5 (8th Cir. 1978); Harley-Davidson Motorsports v. Markley, 279 Ore. 361, 568 P.2d 1359, 1364 (1977). The Times rule was created to protect robust public debate, not robust

luncheon table arguments, which are of lesser public importance.

Moreover, extension of the Times rule to slander actions based on private arguments in the presence of the person defamed creates special problems. There may be countervailing state policies against debate which is too unrestrained, i.e., to prevent breaches of the peace. The conflict with other Court of Appeals and state decisions, and the public importance of the extension of the Times rule, warrants review here.

Turning to the libel claims submitted to the jury, the Court of Appeals held that the first report was an "opinion" and hence immune from liability. While ostensibly based on Delaware law, in fact the Court of Appeals relied on the Restatement of Torts 2d which in turn is but a codification of Gertz v. Robert Welch, Inc., 418

U.S. 323, 339-40 (1974). Hence, the true basis for the decision was an interpretation of federal constitutional law. The Court of Appeals reasoned that an "intangible criterion" was an opinion constitutionally immune from liability, although the testimony in the record of witness John O'Brien and others revealed that the statement did lower plaintiff in the estimation of O'Brien and others. (Slip op., pp. 7-9)

The question of whether an expression of intangible evaluation in an accreditation or licensing report constitutes an "opinion" or "idea" which is constitutionally immune from liability under Gertz is an important one not heretofore decided by this Court. Other courts have routinely held expressions of intangible evaluations generally to be actionable. See, e.g., Arctic Co. Ltd. v. Loudoun Times-Mirror, U.S. Ct. of Appeals, 4th Cir., No. 79-1121,

July 3, 1980. ("They don't have a good reputation in archaeological circles.") If anything, an expression of an intangible in a licensing report should not be classified as a Gertz-type "opinion" even when a similar statement would enjoy that status in a newspaper. An applicant for a government or quasi-government license is entitled to due process and equal protection, which would be violated if the license were denied based, not on facts, but on subjective ideas of the licensing agency. Moreover, a false evaluation in a licensing report results in immediate harm to the applicant, viz., denial of the license, and is not subject to the "correction . . . of other ideas" as public debate generally. Because of the wholesale immunization of reports which the Court of Appeals produced, the issue is important enough for this Court to review.

Also regarding the libel counts, there was direct evidence from witness O'Brien, and deposition evidence, that after reading the last paragraph of the summary of the first report, these witnesses did think the less of plaintiff. Likewise, while the Court of Appeals' construction of the summary of the third inspection report, that only an additional respected legal academic was needed on the Board of Trustees, is possible viewing the report in a vacuum, it was not the view adopted by the participants at the time and place. There is documentary evidence that shortly after receiving this report the new Dean, Weeks, demanded plaintiff's resignation or removal from the Board of Trustees as being necessary for accreditation in a memorandum to the Board itself of February 26, 1975. There is also evidence that right after defendant leaked portions

of the report about the Trustees in general and plaintiff in particular to Student Bar Association President Frederick Kessler in Chicago, and underscored this with his derogatory information and misinformation about plaintiff, the latter led the S.B.A. in demanding plaintiff's resignation or removal from the Board, and that students become so insistent when plaintiff did not resign that they slashed the tires of his car and invaded his classroom, making threats of bodily harm against him. Since the affected participants felt that plaintiff was not the kind of "experienced, recognized, and respected legal educator" who would strengthen the Board, the jury had ample evidence to find that the sentence was a backhanded slap at plaintiff. Thus, there was sufficient invasion of the jury's province by the Court of Appeals to warrant correction here. See Atlantic & Gulf Stevedores, Inc.

v. Ellerman Lines, Inc., 369 U.S. 355, 358-59 (1962); Dennis v. Denver & R.G.W.R. Co., 375 U.S. 208, 210 (1963).

Even assuming that the Court of Appeals was correct in overturning the libel causes of action, its disposition of the case presents important questions under the Federal Rules of Civil Procedure warranting further review. One of the grounds upon which the trial judge had declined to order a new trial was that at a conference on his proposed charges, he instructed counsel to make objections in order to preserve their rights, and defendant's counsel did not object to submission of the libel claims to the jury or the instructions therein. (District Judge's opinion, pp. 15-17) Notwithstanding this failure to make timely objection, the Court of Appeals overturned the verdict because it might have been based on a libel claim, the submission to

the jury of which was not objected to. Had objection been made at the conference, plaintiff could have asked for interrogatories or a special verdict to protect his position.

The Court of Appeals' action seriously undercuts the ability of a trial judge to channel the flow of objections to a conference on instructions ("prayer conference") where the judge and the opposing party may protect against improvident instructions or submission of issues to the jury. The action in this case by the Court of Appeals violates Rule 51 of the Federal Rules of Civil Procedure. Other Circuits have held that failure to object to submission or withdrawal of a claim to a jury in a trial court's instructions is a waiver under Rule 51. Rogers v. Baltimore & O. R.R. Co., 325 F.2d 134, 136 (6th Cir. 1963); 5A Moore's Federal Prac., par. 51.04. Where instruc-

tions precipitate a verdict, failure to object thereto at a conference called for that purpose by the trial judge precludes attack on the verdict as an attempt to circumvent Rule 51. Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691, 695 (8th Cir. 1978). A motion for a directed verdict is not a substitute for objection to instructions. Miller v. New York Cent. R.R., 239 F.2d 10, 13 (7th Cir. 1956). Here the Court of Appeals rejected, sub silento, plaintiff's Rule 51 arguments although pressed in briefs and oral argument. This conflict with other Circuits should be resolved by this Court to avoid unnecessary retrials and to allow parties and trial judges to use interrogatories and special verdicts where defendants claim that one or more of several instances of tort should not be submitted to the jury.

Another conflict with another Circuit

was also created, again without explicit discussion, when the Court of Appeals rejected plaintiff's suggestion that the Second Circuit rule of Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) be followed if it found that one of the defamation claims was improperly submitted to the jury. There, the Second Circuit ruled that if one defamation claim was supported by the evidence and another one was not, instead of ordering a retrial on the valid claim, a general verdict for damages would be appropriately reduced in amount to take into account only the proper claim. While the Third Circuit did not discuss this rule, its action in ordering a retrial constitutes a rejection thereof. The Second Circuit rule is a useful one in economizing on the time of all concerned. The jury trial here took three weeks. Even if the Second Circuit rule is not followed in all cases, it should

be permitted on motion of the successful plaintiff, especially when the defendant's attorney has not objected to submission of all claims to the jury or asked for interrogatories or special verdicts to segregate valid from invalid claims. This conflict with the Second Circuit is also important enough to warrant review here.

Finally, on plaintiff's appeal from a verdict on the interference and manipulation count, the Court of Appeals agreed with the trial judge that defendant would not be liable for his manipulation of the accreditation process unless he went further and participated in the final actions which directly damaged plaintiff, namely, the removal decisions made by Widener College officials. In other words, even though defendant forced an affiliation on the law school with intent to strip plaintiff and fellow conservatives of the protection of a

friendly Board of Trustees, and with knowledge that the new owners would be hostile to plaintiff and be likely to remove him, the defendant is not liable because he does not go further and induce the new owners to do what he knows they will do anyway.

The interference and manipulation count here is actually governed by federal common law because defendant exercised governmental power in denying plaintiff due process and equal protection in the licensing or accreditation process. Carlson v. Green, 64 L.Ed. 15 (1980). This Court has never decided what proximate cause elements are necessary for the tort of denial of constitutional rights. The rule used below is more akin to negligence concepts, and can easily leave a plaintiff remediless without justification. Many denials of constitutional rights cause damage only through the intervention of

third parties whose actions are foreseeable and intended, but not induced by the defendant official (i.e., locking a convict in a cell with others who are known to have threatened to kill him, and who do so without urging by the official). The rule adopted below could prevent recovery in many proper cases, as it did here, and is important enough to warrant review.

## CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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ALFRED AVINS, Petitioner,

v.

JAMES P. WHITE, Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION

(Opinion of Court of Appeals and District Court)

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 79-1747
79-1748

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ALFRED AVINS,
*Appellant* in No. 79-1747

*v.*

JAMES P. WHITE,
*Appellant* in No. 79-1748

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 76-0134)

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Argued March 24, 1980

Before: ROSENN, GARTH and SLOVITER, *Circuit Judges*

(Opinion Filed June 30, 1980)

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## OPINION OF THE COURT

ROSENN, *Circuit Judge*

This appeal in a diversity action presents important questions of defamation law arising out of the accreditation process of a private law school. It arises out of a controversy which had its genesis in the intense conflict surrounding the struggle of Delaware Law School (DLS) and its founder and first dean, Alfred Avins, to se-

cure provisional accreditation by the American Bar Association (ABA) so that the school's first graduating class would be eligible for the state bar examinations. Avins charged that James P. White, serving his first assignment as a consultant for and a member of the ABA accreditation team, in the course of evaluating DLS, made defamatory statements which eventually resulted in Avins losing his position as dean and faculty member of the law school. The jury agreed and awarded Avins $50,000 in compensatory damages. We reverse and remand for a new trial.

I.

In an effort to maintain minimum standards for faculty, facilities, and programs, and to protect students, the public, and the legal profession from substandard law schools, the ABA maintains a Council of the Section of Legal Education and Admissions (Council) and an Accreditation Committee. The Council and Committee carry responsibility for inspecting law schools and recommending to the ABA House of Delegates those law schools eligible for accreditation. In recent years, almost all states have delegated the accreditation responsibility for law schools to the American Bar Association.

Plaintiff, Alfred Avins, possessed an impressive academic background with numerous advanced degrees and many legal publications to his credit. In 1971, he became the founder and progenitor of DLS. DLS was established as a purely private and independent law school, financially dependent for its operations on student tuition. It was able to attract a substantial student body composed principally of students who had been unsuccessful at securing entrance to an accredited law school.

ABA accreditation is critical to the existence of any law school for without it graduates in most states do not have access to the official state bar examination. Provi-

sional approval is granted by the ABA House of Delegates which ordinarily accepts the recommendation of the Council and its Accreditation Committee. The Council and Accreditation Committee act on reports of teams who inspect applying schools. The inspection reports are treated confidentially and are distributed only to the applicant's dean and the members of the Council and Accreditation Committee. The administrative duties of the Council are carried out by a consultant who, in this instance, was the defendant White. The present suit arose out of four ABA accreditation inspections of DLS. On November 12, 1973, Avins requested an ABA accreditation inspection which was conducted in January 1974. The on-site inspection team consisting of White and Professor Millar Rudd, the outgoing consultant, visited DLS and did not recommend accreditation. Instead, they issued a report, a summary of which stated:

> [T]he most important deficiency is an intangible one; there is an academic ennui that pervades the institution. The intellectual spark is missing in the faculty and students.

At the request of DLS, the ABA conducted a second accreditation inspection in May 1974. Defendant White was *not* a member of this inspection team and did not participate in its report. During this inspection, an inspector criticized the school library because it did not contain the United States Code Service. That night DLS obtained a set of the Service and had it stacked in the library by the next morning. The ABA Accreditation Committee and Council met in July 1974 which was attended by Avins. He addressed both bodies. Provisional approval was again denied and the Council adopted a resolution that DLS was not making satisfactory progress under its present administration.

Early in the spring of 1974, a group of concerned parents of DLS students formed a committee to assist DLS in its accreditation problems. When accreditation

was denied for a second time. Judge DiBona, a member of the parents' organization, volunteered to attend the ABA Council's August meeting in Hawaii to find a solution to the school's dilemma. He left armed with a DLS Board of Trustees' resolution establishing three committees to improve DLS. In Hawaii, Judge DiBona presented the resolution to White and learned that Avins' position as dean was a major stumbling block to accreditation. Judge DiBona conveyed this information to Avins upon his return.

Avins thereupon invited White to a DLS Board of Trustees' meeting to be held on August 23, 1974, in Wilmington, Delaware. However, the Board meeting did not eventuate, but Avins, Assistant Dean John Tovey, Judge DiBona, and White went to lunch. At lunch a broad discussion of DLS problems ensued, including a discussion of the book incident of the past May. White allegedly accused Avins of intentionally misleading the Accreditation Committee by falsely representing that the Code Service had been in the DLS library from the inception of the inspection.

Apparently, with the beginning of the new school year, pressures began to mount because of the failure to obtain accreditation. In Avins' words, the "student body became so unmanageable and DLS became so destabilized" that he retired as dean on September 8, 1974. However, he continued as a tenured member of the faculty. DLS thereupon appointed Arthur Weeks as its dean.

The Accreditation Committee conducted a third inspection in January 1975. White was a member of this team. This team also issued a critical report unfavorable to accreditation, although it noted some progress.

> The team feels that the Board would be strengthened by the appointment of an experienced, recognized and respected legal educator. . . . The inspectors believe that the quality of instruction ranges from barely competent to good.

DLS' continued unaccredited status caused panic among its students scheduled to graduate in June 1975. Threats were made against Avins and his car was vandalized.

The new dean of DLS, Weeks, proposed that DLS become affiliated with Widener College. A decision was made on April 12, 1975, to affiliate. In 1976 Dean Weeks filed a set of grievances against Avins and the Widener Board of Trustees voted to dismiss him as a tenured faculty member. He was dismissed on April 20, 1978. White had nothing to do with the grievance committee hearing or Widener's decision to dismiss Avins.

Avins thereupon filed suit against White in Delaware Superior Court for (1) defamation, (2) interference with advantageous relations, and (3) intentional infliction of emotional distress. The defamation charged was based on (1) the first ABA report, (2) the third ABA report, and (3) White's remarks over the book incident at the August 23, 1974, luncheon. On White's application, the case was removed to the United States District Court for the District of Delaware.

A three-week jury trial ensued. White's motions for a directed verdict were denied. The defamation claims were submitted to the jury with the burden of proof set as a "preponderance of the evidence." No special interrogatories were requested or sent to the jury on the defamation counts. The jury found for Avins on the defamation claims and awarded $50,000 in compensatory damages. The jury returned a verdict for White on the other two claims. White appeals from the jury verdict on defamation and Avins appeals from the adverse jury verdict on tortious interference. The intentional infliction of emotional distress claim is not pressed on appeal.

## II.

We note intially that Delaware law governs the substantive law in this diversity case. Our first task, there-

fore, is to determine how Delaware courts would resolve the substantive issues presented by this appeal. *See, e.g., Steaks Unlimited, Inc. v. Deaner*, No. 79-1716 (3d Cir. April 28, 1980). Because a determination of the state law issues may be dispositive and relieve the necessity for examining constitutional issues, we turn to Delaware's law on the substantive issues.

Defamation is defined in the Restatement (Second) of Torts §559 (1977):

> A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Delaware has essentially followed this definition. *See Spence v. Funk*, 396 A.2d 967, 969 (Del. 1978). *See Klein v. Sunbeam Corp.*, 47 Del. 526, 94 A.2d 385,.390 (1952), *Snavely v. Booth*, 36 Del. 378, 176 A. 649, 654 (1935). White's central argument on appeal is that the defamation claims should not have been sent to the jury because the alleged defamatory statements were not false statements of fact but rather were non-actionable opinions. No Delaware cases have been cited to us and our research has not uncovered any dealing with the actionability of opinions as defamation. We must therefore predict what rule Delaware courts would follow.

> The Restatement (Second) of Torts §566 (1977) provides:
>
> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

This principle, making expressions of pure opinion non-actionable as defamation, is grounded on the theory that ideas themselves cannot be false. In *Gertz v. Robert*

*Welch, Inc.*, 418 U.S. 323, 339 (1974), the Court, in dicta, stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

*See Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1026 (1977) (use of "fascist," "fellow traveler" and "radical right" as political labels cannot be regarded as statements of fact).

Although Delaware courts have not had occasion to consider section 566 of the Restatement (Second) of Torts, they have cited the Restatement with approval in libel cases dealing with the defense of conditional privilege. *See Burr v. Atlantic Aviation Corp.*, 348 A.2d at 179, 181 (Del. 1975) (citing with approval Restatement of Torts §619); *Short v. News-Journal Co.*, 58 Del. 592, 212 A.2d 718, 722 (1965) (citing with approval §611 of Restatement of Torts). *Pierce v. Burns*, 55 Del. 166, 185 A.2d 477, 479 (1962) (citing with approval Restatement of Torts §593). We therefore predict that Delaware would also follow Restatement §566 in determining the actionability of opinions as defamation. Avins' defamation claim was based on three separate statements made by White. We must first examine each of these statements to determine if they contain any actionable defamatory material.

The first alleged defamatory statement by White was the summary evaluation of the problems at DLS in the first accreditation report:

> [T]he most important deficiency is an intangible one; there is an academic ennui that pervades the institution. The intellectual spark is missing in the faculty and the students.

Even a cursory glance at this statement reveals its character as pure opinion. The district court apparently allowed this statement to go to the jury because no facts were recited as a basis for the opinion and thus the jury could consider the statement as an opinion based on undisclosed defamatory facts. We perceive no such undisclosed facts. The statement itself is prefaced by the qualification that it is an "intangible" criterion. The use of words like "academic ennui" or lack of "intellectual spark" connote to us no more than a subjective opinion of the educational atmosphere pervading DLS. As such, they more closely approximate a critic's review of an institution rather than a particular individual and are not factual statements disguised in opinion form. Even if the statements were critical of Avins and disparaged his performance "they do not rise (or fall) to that level which would 'lower [him] . . . in the estimation of the community or deter third persons from associating or dealing with him.' The Restatement of the Law, Torts §559; nor do they injure reputation in the popular sense." *Andres v. Williams*, 405 A.2d 121, 122 (Del. 1979). We therefore hold that it was error under Delaware law to allow the summary in the first accreditation report to be submitted to the jury.

Avins' second claim of defamation against White centered on the following statements in the third accreditation report:

> The team feels that the Board would be strengthened by the appointment of an experienced, recognized, and respected legal educator.
>
> * * * * *
>
> The inspectors believe that the quality of instruction ranges from barely competent to good.

Avins charged that these statements falsely implied that (1) he was not an experienced, recognized and respect-

ed legal educator and (2) he was an inferior teacher, although his scholarly acumen was well-known in the legal academic community.

We note first that neither of the challenged statements specifically refers to Avins. Under Delaware law, however, it is not necessary for the alleged defamatory statement to refer specifically to the plaintiff before it is actionable. In *Klein v. Sunbeam Corp.*, *supra*, 94 A.2d at 394, the Delaware Supreme Court stated:

> [I]t is not necessary that the individual defamed in writing need be positively identified in the defamatory language itself, for it seems clear that defamatory language may be made applicable to the plaintiff by extraneous evidence showing that the plaintiff was intended to be referred to by the maker and was understood to be referred to by the reader.

It is necessary for us to examine, therefore, the statements in the third accreditation report to determine whether they were intended by the accreditation team to refer to Avins and whether a reader of the report would so conclude.

We have no difficulty in concluding as a matter of law that the statement regarding teaching quality could not have been intended to or understood as defaming Avins' teaching ability. The evidence reveals that the Avins' classes were not observed and the report itself stated: "Dean Avins is reputed to be a strong and vigorous teacher." It is evident that the report's evaluation of teaching quality at DLS was directed to faculty members other than Avins. We therefore conclude that this statement cannot be considered defamatory and it too should not have been submitted to the jury.

Similarly, when the report's recommendation concerning appointment of an experienced, recognized and respected legal educator to the DLS Board of Trustees is

read in context, no defamatory reference to Avins may be fairly implied. The report reads:

> The inspectors are concerned that the Board, together with the dean and faculty, have not yet defined clear objectives and goals for the institution. The inspectors applaud the selection of several Delaware attorneys as members of the Board. The team feels that the Board needs additional representatives to give it a variety of educational and philosophic points of view. The team feels that the Board would be strengthened by the appointment of an experienced, recognized and respected legal educator.

The district court allowed the last sentence of the report to be considered by the jury as defamatory because it might imply that Avins was not a respected legal educator and that on the underlying facts Avins was not respected by his peers. We, however, see no extrinsic evidence indicating that the statement was intended to impugn Avins' or any DLS Board member's qualifications. The recommendation is directed to the appointment of an additional Board member and his qualifications. Because of Avins' emotional involvement and close identification with the founding of the school, he attributed virtually any criticism of the school as personal defamation. Such speculative inferences fall short of the extrinsic evidence needed to establish the intent of the report as defamatory and the defamatory effect it might have on the reader. We therefore hold that it was error for the district court to allow the third accreditation report to be submitted to the jury. Because we perceive no defamatory reference to Avins, it is unnecessary for us to consider whether the statements in the third report were actionable as opinion based on underlying undisclosed facts.[1]

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1. The amici curiae, American Bar Association, The Association of American Law Schools, the American Council on Education, and the Council on Postsecondary Accreditation, argue that

The third alleged defamatory statement by White was his remarks to Avins at the August luncheon concerning the overnight effort to cure the library deficiency noted in the second ABA inspection. The gist of Avins' complaint is that White falsely accused him of misrepresentation in the presence of Judge DiBona, whose estimation of Avins was subsequently diminished and ultimately resulted in Avins' relinquishment of the DLS deanship. An exact statement of White's remarks at the luncheon was not available, but Judge DiBona testified that the exchange between White and Avins went as follows:

> *White:*
>
> What you did with those books was a horrible thing to have done. We have learned that that night, after you had spoken to the librarian, you then sent some students down to Washington to get these books and snuck them in the library during the night and then in the morning, represented to us that they had been in the library . . . .
>
> *Avins:*
>
> It was a matter of bad judgment on my part.
>
> *White:*
>
> It is a lot worse than bad judgment.

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NOTE 1 — *(Continued)*

even if the comments in the accreditation reports were defamatory, White was nevertheless entitled to a directed verdict. They assert that no question is raised concerning the honesty and regularity of the procedures. They claim that the very nature of the accreditation process is to invite critical opinion. Expressions of qualitative judgment of the faculty and student performance, of administration and curriculum, even though they may be sharp or hard, must be privileged if the process is to be effective and meaningful. Although these contentions may be persuasive and fully consistent with Delaware law, *cf. Burr v. Atlantic Aviation Corp.*, 348 A.2d 179 (qualified privilege exists in employer-employee communications), we do not reach them in view of our conclusion that the statements are not defamatory.

On the basis of Judge DiBona's testimony, White's comment impugning Avins' judgment or representation to the inspection team of the nighttime book purchase may have been potentially defamatory. Avins claimed that he had informed the inspection team of the purchase to cure the deficiency in the set of law books on the required list. Thus, White's sharp criticism might have been based on false or erroneous information and the submission of this issue to a jury to determine whether it was defamatory ordinarily would not have been improper.

White, however, contends that he should have received a directed verdict because of his defense of qualified privilege to the luncheon defamation charge. He contends that he had a qualified privilege to voice his views on the book incident and that this privilege was not abused by his comments in Judge DiBona's presence.[2]

The common law recognized that a conditional privilege to publish defamatory statements existed in a variety of contexts. The Restatement (Second) of Torts §596 (1977) provides: "An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know." *See* L. Eldredge, The Law of Defamation, §87 (1978). The Supreme Court of Delaware in *Pierce v. Burns*, *supra*, 185 A.2d at 479, recognized the existence of such a qualified privilege. In *Burr v. Atlantic Aviation Corp.*, *supra*, 348 A.2d at 181 (1975), the court held:

> A qualified privilege must be exercised with good faith without malice and absent any knowledge of falsity or desire to cause harm.

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2. This common law privilege is distinct from any constitutional privilege which may be conferred by the first amendment. *See* III *infra*.

> The question whether a conditional privilege has been abused by malice or intent to harm ordinarily is a factual question for the jury . . . unless . . . the evidence when considered in a light most favorable to plaintiff is insufficient to raise a factual question upon which reasonable men might differ.

Avins does not dispute that White possessed a qualified privilege to speak on matters germane to DLS' accreditation. He does claim that White's remarks about the overnight book purchase were outside the legitimate scope of those individuals to whom the information should be communicated. Specifically, he contends that because Judge DiBona was not a member of the DLS Board of Trustees and was only informally connected with DLS, White's remarks in his presence constituted "overpublication" and an abuse of the qualified privilege. A conditional privilege may be defeated by a showing of excessive publication. The Restatement (Second) of Torts §604 provides:

> One who, upon an occasion giving rise to a conditional privilege for the publication of defamatory matter to a particular person or persons, knowingly publishes the matter to a person to whom its publication is not otherwise privileged, abuses the privilege unless he reasonably believes that the publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged.

*See* L. Eldredge, *supra*, §93(g). The district court ruled that the jury could find "overpublication" because White discussed with Avins and Tovey at lunch accreditation matters while DiBona was present.

White argues that he had a "reasonable belief" that he could discuss accreditation matters at the luncheon in DiBona's presence, at least while Avins was present, because DiBona had actively spearheaded the parents'

organization's role in aiding DLS in its struggle for accreditation. He claims, although the record is not clear on this point, that Avins had arranged the luncheon in substitution for the trustees' meeting to which he had invited White. We believe, however, that on this record whether White reasonably believed he could talk freely in DiBona's presence was a factual matter for the jury to decide. The trial judge properly instructed the jury that

> [i]f Mr. White reasonably believed he was authorized to speak before someone in Judge DiBona's position, there was no abuse of the privilege by overpublication.

The jury quite properly could have rejected the defense of qualified privilege and we cannot say that the evidence establishes as a matter of law, *Burr, supra*, that White did not abuse his qualified privilege.[3]

We therefore conclude that the jury was properly permitted to consider whether White's remarks about the book purchase incident were defamatory. We are faced, however, with a difficult problem. No special

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3. Amici curiae raise the possibility that Avins consented to the defamation by permitting DiBona to attend the luncheon. Under Restatement (Second) of Torts, §503, "[t]he consent of another to the publication of defamatory material concerning him is a complete defense to his action for defamation." They argue that the purpose of the luncheon obviously was to discuss accreditation problems of the school. If Avins had any reservations about DiBona's presence at the luncheon or had any sensitivity to discussion of accreditation matters in DiBona's presence, he should have objected. Amici assert that Avins prompted the discussion and thereby impliedly consented to take the risk that any admitted act on his part might be the basis of highly unfavorable comment. Moreover, even after the comment on the admitted nighttime purchase of the U.S. Code Service had been offered, Avins did not object to the subject or deny that the incident had occurred. Although there is considerable merit to this argument, White did not raise this defense in his answer and we find no indication that the defense of consent was considered by the jury. We therefore may not consider the issue for the first time on appeal.

interrogatories or verdict form were requested or sent to the jury. It is therefore impossible to determine if the jury based its verdict on all three allegedly defamatory statements or whether the verdict was based on only one or two of the incidents. Inasmuch as we have concluded that two of the three incidents of defamation should not have been submitted to the jury, there is the distinct possibility that if we affirm the jury's verdict, we may do so on the basis of non-defamatory statements. "Where . . . a general verdict may rest on either of two claims — one supported by the evidence and the other not — a judgment thereon must be reversed." *Albergo v. Reading Co.*, 372 F.2d 83, 86 (3d Cir.), *cert. denied*, 386 U.S. 983 (1967). *Accord, United New York and New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613, 619 79 S.Ct. 517, 3 L.Ed.2d 541 (1959); *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967 (3d Cir.) *cert. denied*, 100 S.Ct. 666 (1979). We therefore will reverse the judgment of the district court and remand for a new trial on the defamation count limited to the alleged luncheon defamatory remarks about the misrepresentation to the Accreditation Committee concerning the book purchase.

III.

We are left with the difficult task of determining the standard of proof Avins must meet on remand to sustain his claim of defamation against White. White argues that apart from any common law privilege, he possessed a qualified first amendment privilege because Avins was a "public figure" and therefore must under the rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny prove by "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). *See Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d

Cir. 1979) (en banc). The district court declined to hold that Avins was a public figure and instructed the jury that Avins need only prove defamation by a preponderance of the evidence. White argues that Avins was a public figure within the meaning of the *New York Times* line of cases and that a higher standard of proof is therefore required.

In *New York Times, supra*, the Supreme Court held that the first amendment confers a qualified immunity on the news media when it is sued by a public official for defamation. A public official must prove "actual malice" on the part of the defendant; *i.e.*, that the defamatory statements were made with knowledge of their falsity or with reckless disregard of the truth. *New York Times, supra*, 376 U.S. at 280. The Court soon expanded this immunity to defamation suits brought by "public figures." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court in *Gertz, supra*, 418 U.S. 345, gave a description of who may be a public figure:

> For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

The *Gertz* test envisions basically two types of public figures: (1) those who are public figures for *all* purposes; and (2) those who are public figures only in the context of a particular public controversy. The latter type of public figure has proven to be the more difficult to define.

In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court held that the socialite wife of a wealthy industrial-

ist was not a public figure despite her highly publicized divorce because she had not freely chosen to publicize her private life. The Court in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), held that a mental health researcher who had received a federal grant was not a public figure in a defamation suit brought against Senator William Proximire for his bestowal of a "Golden Fleece Award." In *Hutchinson*, the defendant had himself created the controversy into which the plaintiff was drawn and the Court held that the defendant could not transmute the plaintiff into a public figure by his own action. *Id.* at 135. Finally, the Court in *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), held that a plaintiff who had appeared before a grand jury investigating espionage in the 1950's had not voluntarily injected himself into a public controversy and was not a public figure. The Court indicated that the plaintiff "was dragged unwillingly into the controversy." *Id.* at 166.

The policy behind according public figures less protection against defamatory statements is bottomed on several ideas. Public figures generally have "greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals enjoy." *Gertz, supra*, 418 U.S. at 344. Also, public figures, because they have voluntarily chosen to involve themselves in public controversies assume a risk of increased injury from defamation. *See, id.* at 345; *Wolston, supra*, 443 U.S. at 164; *Steaks Unlimited v. Deaner*, No. 79-1716 (3d Cir. Apr. 24 1980), slip op. at 16. In short, public figures are expected to be more resilient to criticism.

We have no difficulty in concluding that Avins is not a public figure for all purposes under the first part of the *Gertz* test. Although Avins was apparently well-known in legal academic circles, we do not believe he possessed the fame and notoriety in the public eye necessary to make him a public figure for all purposes. This

leaves the question whether Avins is a public figure in the limited context of the DLS accreditation struggle. We must accordingly consider whether (1) the DLS accreditation struggle was a public controversy and (2) if so, whether Avins voluntarily injected himself into that controversy.

Our first task is to determine whether DLS' accreditation struggle may fairly be considered a "public controversy." The D.C. Circuit has recently stated: "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Waldbaum v. Fairchild Publications, Inc.*, No. 79-1407 (D.C. Cir. March 31, 1980), slip op. at 16. The district court concluded that the DLS accreditation struggle was only of interest to the school, students and their families and was not of general public interest. We believe the record is to the contrary.

Although DLS was formed and operated as a purely private law school, its success or failure was of importance to the Delaware State Bar as well as to any individual interested in attending an accredited law school in Delaware. It is the only law school in the State of Delaware. Accreditation of DLS would create a new source of attorneys who could qualify to take the Delaware Bar examinations and be admitted to practice in the state. Furthermore, a majority of DLS students were from out of state. Thus, DLS' accreditation would also affect the interests of students from a variety of locales and admission to State Bars outside of Delaware.

Further, there is evidence in the record that mass meetings were held and that individuals from other states concerned about DLS visited the school. The local news media, as well as the Delaware Bar Association, publicized the events surrounding DLS' formation and struggle for accreditation. We conclude that DLS' accreditation affected the "general public or some segment

of it in an appreciable way," *Waldbaum, supra*, slip op. at 16, and that therefore the DLS accreditation struggle was a public controversy. We therefore hold that DLS' accreditation was a legitimate public controversy within the meaning of *Gertz*.

We now must consider whether Avins voluntarily injected himself into the public controversy concerning the accreditation. The court in *Waldbaum* stated: "[T]he court must ask whether a reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy . . . ." Slip op. at 21.

We have no difficulty in concluding that Avins voluntarily injected himself into the controversy surrounding DLS' accreditation. As creator, chief architect, and the first dean of DLS, Avins spearheaded its drive toward accreditation. Indeed, the first major hurdle which Avins had to surmount in behalf of DLS was accreditation. The record reveals that from the outset Avins, as dean, was actively involved in every facet of the accreditation struggle. He, in fact, invited the first three accreditation teams to inspect DLS and he personally presented DLS' case before the Council and Accreditation Committee. Unlike the plaintiffs in *Firestone, supra*, *Hutchinson, supra*, and *Wolston, supra*, Avins was not involuntarily dragged into a controversy not of his own making. It was Avins who as dean of DLS officially requested, invited, and affirmatively invoked the accreditation process of the American Bar Association. We therefore conclude that Avins played an affirmative and aggressive role in the accreditation process and that he was a public figure for that limited purpose.

Our holding that Avins is a public figure in the context of the DLS accreditation controversy would seemingly require that on retrial he be required to prove by clear and convincing evidence that White made the alleged comments about Avins' involvement in the book

misrepresentation and that he knew they were false or that he made them with reckless disregard for their truth. However, the Supreme Court has not yet decided whether the *New York Times* privilege applies to a non-media, private defendant such as White.

White's remarks about Avins' role in the book incident were directed at an extremely narrow audience consisting principally of Judge DiBona. Thus, this case in no way resembles the media cases. This is not a case of an attack in a public medium against an unwilling target. Although the *New York Times* privilege was born in the context of the institutional press' need to be free from the threat of libel suits so that public debate on public issues be vigorous and open, we see no indication in that decision that the privilege should be limited to the media's exercise of the first amendment right to freedom of press. Indeed, the evil sought to be avoided by the *New York Times* privilege is self-censorship: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable 'self-censorship.' " 376 U.S. at 279.

We believe the importance of the accreditation process underscores the need for extension of the *New York Times* privilege to a private individual criticizing a public figure in the course of commenting on matters germane to accreditation.[4] An accreditation evaluation by its nature is critical; the applicant school invites critical comments in seeking accreditation. In order to succeed, individuals involved in the accreditation process need to be assured that they may frankly and openly discuss accreditation matters. White, in criticizing Avins at the luncheon, was expressing a candid view of Avins' conduct during the accreditation process. To require an in-

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4. We need not at this time consider whether the *New York Times* privilege extends to *all* private individuals regardless of the context in which the alleged defamatory statement is uttered.

dividual like White to insure the accuracy of his comments on accreditation matters would undoubtedly lead to self-censorship which will jeopardize the efficacy and integrity of the accreditation process itself. Since the public is vitally affected by accreditation of educational institutions, we believe that self-censorship in the accreditation process would detrimentally affect an area of significant social importance.

Nor does the narrow audience in which the alleged defamatory statement was published persuade us that the *New York Times* privilege should not be extended to a person in White's position. Indeed with a narrow audience, the possibility of injury from an untruthful statement may be significantly less. More fundamentally, however, we believe that non-extension of the *New York Times* privilege to private individuals like White creates a dangerous disequilibrium between the first amendment's guarantees of freedom of speech and the press. As the court stated in *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975):

> Our understanding of *New York Times* and its offspring is that private persons and the press are equally protected by the requirement that false comment about public figures must be knowing or in reckless disregard of the truth in order to be actionable. It seems to us a necessary corollary that comment about public figures should be equally protected whether made in mass media or in private. This is required both by the First Amendment, which speaks equally of freedom of speech and of the press, and by common sense, for if the "press" were given more protection than "private speech," persons would be encouraged to rush allegations into wide publication rather than to carefully present them to informed parties for verification or refutation in a more private setting.

We find this reasoning persuasive. Indeed, we think it would be anomalous to accord a Delaware newspaper a qualified immunity for publishing charges of misrepresentation by Avins but deny the same immunity to White. Accordingly, we hold that Avins must prove by clear and convincing evidence that White made his accusation of the book misrepresentation knowing of its falsity or with reckless disregard for the truth.[5]

White urges that no retrial is necessary because there is no clear and convincing evidence that he made his charge of book fraud knowing that it was false or with reckless disregard of the truth. Although there appears to be scant evidence that White made a knowingly

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5. We do not believe that our decision today conflicts with Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir.) *cert. denied*, 404 U.S. 898 (1971). In *Grove*, a corporation brought a libel action against the defendant who had issued an allegedly false credit report to its subscribers. We held that the *New York Times* privilege did not apply to the dissemination of a private credit report. *Grove*, however is distinguishable from the present case. In *Grove* we held under the pre-*Gertz* test of public figure status as involving a matter of legitimate public concern, Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971), plaintiff's business or credit standing was not a matter of real public interest. *See* 438 F.2d at 436-37. In the instant case, we have concluded that the DLS accreditation struggle was a public controversy.

In *Grove*, we also indicated that the medium in which the defamatory statement was communicated — a private subscription credit reporting service — did not entitle the defendant to the *New York Times* privilege. *See* 438 F.2d at 437. This language is arguably dicta and may be limited to the situation of commercial credit reports. *See generally* Hood v. Dun & Bradstreet, 486 F.2d 25, 29 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). Even if this language is not dicta, we believe *Grove* is nonetheless distinguishable. The subscribers to the credit reports had only a generalized interest in the defendant's report on the plaintiff corporation whereas in the instant case, all those present at the luncheon had a vital interest in the accreditation controversy. Thus, the forum in the instant case militates in favor of application of the *New York Times* privilege to insure that discussion be robust and uninhibited.

false statement, it is possible that he had recklessly failed to ascertain the facts surrounding the book incident. We believe it is properly the task of the jury to weigh the evidence and we cannot say as a matter of law that Avins cannot prove that White's statements were made with actual malice. We therefore believe that a new trial is warranted.

IV.

The sole remaining issue before us is Avins' appeal from the jury's verdict in favor of White on the interference with advantageous relations claim. The essence of this claim is that White's actions in the accreditation process caused Widener College to eventually terminate Avins as a professor at DLS.

Avins first claims the court erred in instructing the jury as to the scope of White's privilege to convey information about the DLS accreditation process to other individuals. We have examined the court's charge in this regard and find no error. More significantly, Avins maintains the court's instruction on proximate cause was too narrow for an intentional tort like interference. The court charged:

> Mr. White can be held liable only if his activities contributed in a material and substantial way to the removal decisions made by [Widener], and were a factor without which the removals would not have occurred.

We see no error in this instruction. Although interference is an intentional tort, the Restatement (Second) of Torts §767(f) specifically lists as a factor of the tort "the proximity or remoteness of the actor's conduct to the interference." The Restatement emphasizes that the interference even if intentional cannot be remote. *Id.* Comment (b). The court's jury charge underscores the substantial relation between White's actions and Widen-

er's dismissal of Avins which must exist before liability for interference obtains. We believe the jury charge adequately set forth the causation requirement for interference of advantageous relations and we accordingly decline to order a new trial on the interference count.

V.

In sum, we conclude that Avins may maintain his defamation action against White on the basis of White's charge of book misrepresentation, but the jury, on retrial, must be instructed that Avins, as a public figure, must prove by clear and convincing evidence that White's accusation was made with actual malice. The judgment of the district court will be reversed in No. 79-1748, the jury award vacated, and the case remanded for proceedings not inconsistent with this opinion. The judgment of the district court in No. 79-1747 will be affirmed.

Each side to bear its own costs in No. 79-1748. Costs taxed against appellant in No. 79-1747.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

United States Court of Appeals

for the Third Circuit

Nos. 79-1747/79-1748

ALFRED AVINS,
Appellant in No. 79-1747

vs.

JAMES P. WHITE,
Appellant in No. 79-1748

(D. C. Civil No. 76-0134)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE ---- DISTRICT OF DELAWARE

PRESENT: ROSENN, GARTH and SLOVITER, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of Delaware and was argued by counsel on March 24, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 27, 1978, be, and the same is hereby reversed in appeal No. 79-1748, the jury award be and the same is hereby vacated and the cause is remanded for a new trial; the judgment of the said district court be and the same is hereby affirmed in appeal No. 79-1747; all in accordance with the opinion of this Court. Each side to bear its own costs in No. 79-1748. Costs taxed against appellant in No. 79-1747.

ATTEST:

Clerk

June 30, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

ALFRED AVINS, Plaintiff,

v.

JAMES P. WHITE, Defendant.

Civil Action No. 76-134

District Court's Opinion

STAPLETON, District Judge:

The plaintiff in this case, Alfred E. Avins ("Avins"), is the founder of Delaware Law School and during the period relevant to the claims here asserted served as a member of its faculty, as its Dean and as a member of its Board of Trustees. The defendant, James P. White ("White"), was the consultant to the American Bar Association Committee on Accreditation.

Avins pressed three types of claims against White: three defamation claims, an intentional infliction of emotional distress claim and an interference with advantageous relations claim. At the close of the case, the jury was asked to render a separate verdict on each category of claim. Unfortunately, it was not asked to return separate verdicts on each of the three defamation claims. The jury returned verdicts for the defendant on the plaintiff's last two claims. It returned a verdict in the plaintiff's favor, however, on the defamation claims and awarded damages in the amount of $50,000. Defendant has filed post-trial motions for a judgment n.o.v., for a new trial, and for a remittitur.

## I. JUDGMENT N.O.V.

The defendant seeks a judgment notwithstanding the verdict on the ground that there is insufficient evidence to support a verdict on any of the three defamation claims. He recognizes, of course, that he is not entitled to a judgment in his favor if there is evidence in the record to support any one of these claims. while the sufficiency of the evidence on the first two claims presents closer questions, I think it clear that the evidence, when viewed in the light most favorable to the plaintiff, provides ample support for the third claim. Accordingly, the motion for a judgment n.o.v. will be denied.

Avins' third defamation claim pertained to a luncheon held on August 23, 1974 at which White, in the presence of Avins, Assistant Dean Tovey, and Judge G. Fred DiBona, Chief Judge of the

Court of Common Pleas of Pennsylvania and a parent of a Delaware Law School student, related an episode involving Avins and a prior inspection. White's account reflected adversely on the personal integrity of Avins. Judge DiBona described what happened at the luncheon in the following terms:

> It had been reported to me somewhere along the line by many of the students that on the occasion of the second inspection that there was a series of books which were not in the law library which apparently the librarian in charge of that inspection felt were absolutely musts for a law school, and that that evening, after he had discovered the absence of them or noted their absence, he had discussed with Dean Avins this particular series of books. . . .
>
> At the [luncheon] meeting Dean White recounted the story of these books, that the books had not been in the library, that Dean Avins had assured the librarian they were in the library, and the next morning Dean Avins brought the librarian of the visiting team into the library and showed him where the books were. . . .

Dean White said to Dean Avins, "What you did with respect to those books was a horrible thing to have done. We have learned that that night, after you had spoken to the librarian, you then sent some students down to Washington to get these books and snuck them in the library during the night and then in the morning represented to us that they had been in the library, represented to Payton Neal, I think it was, the librarian, that they in fact had been in the library."

Dean Avins said, "It was a matter of bad judgment on my part."

And Dean White said, "It was a lot worse than bad judgment."

Avins also testified about the same event:

Dean White adverted to the so-called books incident, the U.S. Code Service. At one point, I said something like, All right, maybe I should have convened a faculty committee, maybe it was just poor judgment on my part, or something like that.

He said, No, it is more than that, it is bad faith, and so forth, fraud, or something like that. He either said or implied there was some sort of fraud.

Avins testified that the book episode

and alleged misrepresentations never occurred and Dean Prince, a member of the ABA team who was making the inspection during which the episode allegedly occurred, gave testimony tending to support Avins' position. There was no competent evidence that the book episode or the alleged misrepresentations in fact occurred.*

On the basis of this evidence the jury was entitled to conclude that White published a defamatory statement about Avins, that the statement was false, and that Avins as a professional and as an educator was lowered in the eyes of Judge DiBona. While defendant asserts that Judge DiBona already had the information conveyed, and that Avins, accordingly, could not have been

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*White did not purport at trial to have personal knowledge of the episode.

injured, this is no answer. It is one thing to have heard a rumor and another thing to be told by a representative of the American Bar Association that "we have learned" the truth about that night. There is ample evidence from which the jury could have concluded that Judge DiBona's actions after August 24, 1974 were less favorable to Avins than his actions before.

Finally, White asserts that there was no evidence to satisfy plaintiff's burden of proving that White abused his qualified privilege. I conclude to the contrary. White's qualified privilege came by virtue of his position and job responsibilities. There was ample evidence from which the jury could have concluded that White's employer considered information developed in the course of the accreditation process to

be highly confidential and that White was authorized to disclose such information only to the Council, the School Administration, and the governing body of the institution. If the jury accepted this view of White's authority they may well have concluded that the statements made to one like Judge DiBona were over publications and, accordingly, an abuse of his qualified privilege. There is also evidence involving friction and disagreements between White and Avins which conceivably could have led the jury to conclude that White's motive in communicating the defamatory matter was for a purpose other than the fulfilling of his job responsibilities.

## II. NEW TRIAL.

White makes three arguments in

support of his motion for a new trial: (1) there was insufficient evidence to support one or more of the defamation claims, (2) the Court erred in failing to instruct the abuse of the privilege must be shown by "clear and convincing evidence", and (3) the verdicts were inconsistent.

Defendant's first argument is based on the proposition that if one claim of several should not have gone to the jury and a jury verdict for the plaintiff might have been based on that claim, a new trial should be granted. Corbett v. American Newspapers, 5 A.2d 245 (Del. Super. 1939); Albee Homes, Inc. v. Lutman, 274 F. Supp. 875 (D. Pa. 1975), aff'd. in part, 406 F.2d 11 (3d Cir. 1969); Nowery v. Smith, 69 F. Supp. 755 (D. Pa. 1946), aff'd. per curiam, 161 F.2d 732 (3d Cir. 1947). I

will assume for present purposes that this proposition is sound.

In the summary of the First Inspection Report, Inspectors Ruud and White stated as follows:

> . . . but the most important deficiency is an intangible one; there is an academic ennui that pervades the institution. The intellectual spark is missing in the faculty and the students.

While I think it far less likely that the jury verdict was based on this report than that it was based on the so-called book fraud episode, defendant is correct in pointing out that the form of the verdict does not permit one to rule out the First Inspection Report as a possible basis for the verdict. Professor White maintains it would be an impermissible basis because a reasonable mind could not construe this language in context as being defamatory of plaintiff and because these statements

are clearly ones of opinion.

In order to evaluate whether the summary of the First Inspection Report is capable of a defamatory construction one must appreciate the fact, revealed in the Report, that Avins was "Mr. Delaware Law School." He was its founder, its Dean, a faculty member, and a member of its board. He recruited and hand picked the faculty and admitted the students; he set its curriculum and educational policy with virtually no input from the other faculty. Thus, when the report notes a pervasive atmosphere of academic ennui and states that the faculty lacks intellectual spark, a reasonable person could conclude, I believe, that the recipients of the report might think substantially less of plaintiff not only as a faculty member but also as a law school

administrator. I have reread the entire report and find nothing in the context of the above-quoted statements which militates against such a defamatory construction. Contrary to defendant's suggestion nothing else in the Report speaks well of plaintiff as a teacher. While the inspectors do not purport to have visited a class taught by plaintiff, they do report that "office and informal visits were untaken with the Dean and each faculty member" and it is apparent from the Report that there had been substantial contact with the plaintiff and the remainder of the faculty during the inspection.

Professor White is, of course, correct when he observes that the foregoing statements were opinions. This does not mean, however, that they cannot be found to be defamatory. Despite

the fact that these statements are found in the "summary," this is not a case in which the defendant has disclosed facts about the plaintiff and then expressed an opinion about him based on those facts. In such a case there is no liability if the facts are true or non-defamatory. In this case, however, there are no facts stated in the Report which form a basis for the opinions and those opinions could reasonably be found by the jury to imply that the inspectors, during their vists with the Dean and faculty, had observed defamatory facts (e.g. episodes involving boredom with and disinterest in the teaching process). As I explained to the jury in my charge, in such circumstances there can be liability predicated on a statement of opinion. See Restatement, Torts

2d, § 566.

In connection with plaintiff's remaining defamation claim, the Court's instruction repeated the following excerpt from the Third Inspection Report which White helped to author:

> The team feels that the Board would be strengthened by the appointment of an experienced, recognized and respected legal educator. . . . The inspectors believe that the quality of instruction ranges from barely competent to good.

While it is a relatively close question, given Avins' presence on the board and the identification of the school with Avins in people's minds, I conclude that a reasonable jury could have found inherent in this section of the Report a negative implication that Avins was not a respected legal educator. While it is not a necessary inference, there was also evidence pertaining to Avins' career and scholarly

achievements from which the jury could have inferred that he was a respected legal educator. Once again, while the statement is in the form of an opinion, the jury may have inferred that the authors had knowledge of facts indicating that Avins was not respected by his peers.

In addition to the fact that a reasonable jury could have found from the evidence that White defamed Avins on all three alleged occasions, there is another reason why defendant's motion for a new trial should not be granted. While the defendant moved for a directed verdict at the close of all the evidence on all claims asserted by Avins, after the Court ruled that it would charge on defamation, the defendant did not object to the portions of the charge relating to either the First

or Third Inspection Reports.*

After studying the submissions of counsel, the Court prepared a draft charge which set forth the contentions of the parties and the applicable law. At the commencement of the prayer conference, the Court instructed counsel that the draft charge represented an effort by the Court to accommodate the varying requests of the parties and that they must object to any portion they believed to be erroneous in order to preserve their rights. I recall no objection to the portions of the charge about which defendant now complains. Indeed, I thought the question of whether the Third Report should go to the jury was a close question and was expected an objection. When none was forthcoming, I assumed that defendant

*Nor do I recall any objections at the end of the charge to these portions of it.

felt confident about how the jury would come out on the point, as indeed I would have felt, and did not want to assume the risk of reversal on appeal on the theory that a claim plaintiff was strenuously pressing had erroneously been taken from the jury.

The Court instructed the jury that, on the undisputed facts, the defendant had a conditional privilege and that it could find for the plaintiff only if he established abuse of the privilege by a preponderance of the evidence. Defendant agrees that the burden of proof was correctly placed upon the plaintiff to prove an abuse of the privilege but argues that the Court erred in failing to instruct that "clear and convincing evidence" of abuse was required.

This Court charged as it did because it did not view Avins as a "public

official" or a "public figure" for purposes of application of the New York Times rule and because it did not believe the Supreme Court of Delaware would adopt the "clear and convincing evidence" test for private figure cases. My view remains the same.

Plaintiff was the Dean of a proprietary law school who acted solely on its behalf in requesting provisional accreditation. While the controversy which ultimately developed over the school accreditation was obviously of intense interest to the students of the school and their families, the evidence does not suggest that it was a matter of general public interest. Even if the evidence so indicated, however, this would not render the New York Times rule applicable. The following observations regarding Mrs. Firestone

in Time, Inc. v. Firestone, 424 U.S. 448 (1976), are also applicable here:

> Respondent did not assume any role of especial prominence in the affairs of society, . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.
>
> Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that "extension of the New York Times test proposed by the Rosenbloom plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." 418 U.S. at 346.

I also note that the alleged defamation did not come in the context of communicating information relevant to a public issue to the public. In this respect, this case is much like Grove v. Dunn & Bradstreet, 438 F.2d 433 (3d Cir. 1971), in which the Third Circuit refused to apply the New York Times rule.

This is not to say that the public did not have an interest in Professor White's being candid in his reports to his employers and to others interested in the law school. It was precisely because of that public interest that the Court held as a matter of law that he was entitled to a qualified privilege. Under traditional privilege law, as contrasted with the First Amendment law, this meant that plaintiff had the burden of proving an abuse of the

privilege and that plaintiff could not prevail on a showing of negligence alone. Under that law it did not mean that defendant was entitled to a "clear and convincing evidence" charge.

Finally, in support of his motion for a new trial defendant urges that the verdict in plaintiff's favor on his defamation claims is inconsistent with the verdict in nis favor on the remaining claims. I fail to perceive any inconsistency.

## III. REMITTITUR.

Defendant asks that a remittitur be ordered. I cannot say, however, that the $50,000 verdict in this case is beyond the range of reason. As earlier noted, there was evidence from which the jury could have concluded that Avins was a highly respected figure in

the academic legal world. There was also evidence from which the jury could have found that accusing Avins of lying before a judge and disparaging his professional capabilities before members of the American Bar Association Committee on Accreditation had and would continue to have, a substantial impact on Avins' professional reputation and, accordingly, on his future career in the academic world.* I believe this evidence alone would adequately support the verdict.

In addition, however, the jury was instructed that they could award punitive damages if (but only if) they found "clear and convincing evidence" that the defendant had actual knowledge of the falsity of the statement made or

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*The evidence showed that at that stage in his career plaintiff's salary was $30,000.

had a high degree of awareness of the probable falsity of the facts stated and published them with reckless disregard for whether they were true or not. There was evidence from which the jury could have concluded that defendant had defamed plaintiff with one of these two states of mind and a portion of the $50,000 verdict may be attributable to such a finding.

All of defendant's post-trial motions will be denied.

MARCH 20, 1979

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-369

IN THE

# Supreme Court of the United States

October Term, 1980

ALFRED AVINS,

*Petitioner,*

*v.*

JAMES P. WHITE,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## SUMMARY OF THE ARGUMENT

### (Numbers Correspond to Petitioner's Numbered Questions Presented)

1-6. None of the petitioner's first six questions presented, all of which concern the rule of *New York Times v. Sullivan,* warrant review. The alleged defamatory comments concern a "public matter" (accreditation of a law school) about a "public figure" (the founder, dean, faculty member, and member of board of trustees of the law school), and were made by a person (ABA consultant on accreditation matters) exercising an important societal function (overseeing accreditation of law schools), which requires expression of candid views and no self-censorship. All these areas have been previously considered by this Court. Furthermore, to the extent that the alleged comments were made in a non-traditional type media setting, the alleged defamatory comments involved educational matters which this Court has previously ruled to be Constitutionally protected, even if made in a private setting.

7. The Court of Appeals did not invade the province of the jury. It did not make any finding of fact contrary to the jury. It did, however, hold certain matters were, as a matter of law, not for jury consideration. In any event, because of Constitutional overtones in defamation cases, appellate courts have a wider latitude for record review.

8. There was no Rule 51 waiver of any objection to the jury charge. Defendant's (respondent's) position had been clear throughout the entire course of litigation and further objection would have been unavailing.

9. This Court and the Circuit Courts hold that when a general verdict is based on more than one claim, one of which has been improperly submitted to the jury, a new trial is required.

10. The proximate cause standard applied below was consistent with federal law and would not result in dif-

fering verdicts from state to state. It was, therefore, correctly applied.

## STATEMENT OF THE CASE

### A. Procedural History

This tort action was originally filed by petitioner in March, 1976, in the Delaware Superior Court and removed to the District Court of the District of Delaware on grounds of diversity of citizenship. Petitioner alleged defamation, interference with advantageous relations and intentional infliction of emotional distress. After respondent's motion for summary judgment was denied, the case was tried before a jury which returned a $50,000 verdict for petitioner on the defamation claim and a verdict for respondent on the other claims. Respondent filed post-trial motions for judgment notwithstanding the verdict, new trial or remittitur. These motions were denied, and respondent appealed to the Court of Appeals for the Third Circuit. The Third Circuit affirmed the jury's verdict in favor of respondent. However, it reversed the verdict in favor of petitioner on the defamation claim. A new trial was ordered on one of the alleged grounds of defamation and judgment was entered for respondent on two of petitioner's allegations of defamation.

On September 8, 1980, petitioner filed a writ of certiorari to the United States Court of Appeals for the Third Circuit. This is respondent's brief in opposition.

### B. Statement of the Facts Relevant to the Issues Presented for Review

This case concerns the struggle of the Delaware Law School (DLS) to secure provisional accreditation by the American Bar Association (ABA) so that DLS' first graduating class would be eligible to take bar examinations. Provisional approval, as governed by the ABA standards

is granted by the ABA House of Delegates which ordinarily accepts the recommendation of the Council of the Section of Legal Education and Admissions to the Bar (herein the Council) and its Accreditation Committtee. The Council and Accreditation Committee act on reports of teams which inspect applying schools. The Council and Accreditation Committee meet twice a year to consider these reports, at which time representatives of the inspected schools have the opportunity to appear and comment. The reports are considered confidential and are only distributed to the applying school's dean and members of the Council and Accreditation Committee. The administrative duties of the Council are carried out by a consultant who is employed on a full-time basis (G16-18; K192-193).[1]

Petitioner, Alfred Avins, is the founder and first dean of DLS. He was, at all times relevant, also a member of the faculty and the board of trustees. Respondent, James White, was, at all times relevant, Consultant[2] to the Council. He was also, on two occasions, a member of inspection teams which examined DLS.

Delaware Law School was founded in 1971 by Avins. On November 12, 1973, Avins requested an inspection to determine whether DLS substantially complied with the appropriate standards.

The inspection was held January 14-16, 1974. Members of the inspection team were Millard Ruud (Ruud), the outgoing Consultant to the Council (K29), and White. This was White's first assignment as Consultant (G118).

1. Citations to parts of the transcript of the trial in District Court are given first to the volume designation and then the page number, as (G16). The second citation, where given, refers to the volume of the appendix filed in the Third Circuit and the page number within the volume, as (AV III, a37). Citations to petitioner's brief here are made thus: (PB5).

2. His duties as Consultant are described at G21-23.

DLS was found lacking in almost every regard: administration, faculty, library, student quality and physical plant. The summary in the inspectors' report is the basis of plaintiff's first defamation claim.

The Accreditation Committee and the Council, in February, 1974, considered the application, and Avins appeared before both bodies. Provisional approval was denied.

At the request of DLS, a second inspection was held in May, 1974. White was not a member of the team. During this inspection, an inspector criticized the library for not containing the U. S. Code Service. That night, students went to Washington, D. C., secured the books, and had them shelved the next morning[3] (F49-52). The second inspection report, which did not involve White's participation (K124), criticized many aspects of DLS.

During the spring of 1974, a group of interested lawyers and judges whose sons and/or daughters attended DLS formed a "Judges Committee" to render assistance to DLS in obtaining accreditation (I11-12).

In July, 1974, the Accreditation Committee and Council met to consider the second report. Avins addressed both bodies. Provisional approval was again denied. The Council also adopted a resolution that DLS was not making satisfactory progress under its present administration.

Thereafter, the Judges Committee met with Avins to assess DLS' situation. Avins felt he was the stumbling block (I20). Judge DiBona volunteered to go to the August Council meeting in Hawaii to learn what he could about DLS' situation (I23).

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3. This incident is not reflected in the body of the second team's inspection report. However, it is important background for plaintiff's third defamation claim.

To assist DiBona, Avins gave him a resolution of the board of trustees of DLS which established three committees to improve DLS (I13; AV III, a37).

Prior to his trip to Hawaii, DiBona, at Avins' request, addressed a student meeting and persuaded the students to do nothing until after his trip to Hawaii (I23-26; AV III, a40-43).

In Hawaii, DiBona was able to present the board of trustees resolution to White (I14-15; AV III, a38-39). He also talked to a number of persons connected with the Council (I29-37). DiBona left convinced that Avins had to resign as Dean. He relayed this to Avins upon his return (I38; AV III, a44).

On August 23, 1974, White visited DLS at Avins' request to attend a meeting of the board of trustees (K208; AV III, a61). The board did not meet. Instead, there was a luncheon meeting attended by Avins, Assistant Dean John Tovey, Judge DiBona, and White (K209; AV III, a62). The meeting involved a wide discussion of DLS' situation and the "book incident" was touched upon. According to Avins, White said or implied that Avins' actions amounted to some sort of fraud (F79; AV III, a31). DiBona's testimony differed slightly but clearly reflected White's critical opinion of Avins' conduct (I58-60; AV III, a46-48). White's comments are the basis of plaintiff's third defamation claim (O92-93; AV III, a81-82).

Avins resigned as dean on September 8, 1974 (F89). About a week later, Arthur Weeks became the second dean of DLS.

A third inspection had already been scheduled for late Fall of 1974. At Weeks' request, it was delayed (L207-208). Weeks requested that one of the inspectors have prior knowledge of DLS. White suggested that he come, and Weeks agreed (L214-216). The third inspection was held in January, 1975. The third report noted improvements but still recommended denial of provisional

accreditation. The summary in the third report provides the basis for Avins' second claim of defamation.

In February, 1975, the Council and the Accreditation Committee met. A delegation from DLS headed by Weeks addressed both bodies but still failed to obtain provisional approval. The Council and the Accreditation Committee deferred approval until a fourth inspection could be held (L224).

After returning to DLS, Weeks suggested affiliation with a college or university (L227). On April 12, 1975, a decision was made to affiliate DLS with Widener College (L230).

In May, 1975, a fourth inspection was held. White was not on the team. By this time, the DLS board had agreed to affiliate, and provisional approval was recommended.

In July, 1975, the Accreditation Committee met in Chicago and voted again to defer provisional approval. The next day the Council reversed the Accreditation Committee and recommended provisional approval which was granted in August, 1975 (L236).

In 1976, Weeks filed a set of grievances against the plaintiff in connection with his tenured position on the faculty (L232). White had nothing to do with the filing of the charges (L232) and was not consulted before they vere filed (L233). Plaintiff was dismissed as a tenured faculty member on April 20, 1978. White had no part whatsoever in the grievance committee hearings or in the decision to dismiss Avins (E211-212).

In August, 1978, the House of Delegates of the ABA granted full approval to DLS (B61).

## ARGUMENT

**Generally, the New York Times v. Sullivan Issues Herein Do Not Present Questions Warranting Review Since All Comments in Question Concern a Public Matter About a Public Figure and Were Made by a Person Exercising an Important Societal Function Requiring an Expression of Candid Views and No Self-Censorship.**

Although presented as separate issues, each of petitioner's first six "questions presented" concern the application to this case of *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and its progeny. Application of *New York Times* depends on the nature of the controversy and "the nature and extent of an individual's participation in the particular controversy giving rise to defamation," *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

The general nature of the controversy here is educational. The specific nature of the controversy is the struggle of DLS to obtain provisional accreditation from the ABA.

Petitioner was the founder of DLS, its dean during the formative years and at the time of the first two inspections, and a faculty member and member of DLS' board of trustees during the entire accreditation struggle. Respondent is the consultant to the ABA on matters involving the accreditation of law schools. On two occasions, he was also an inspector and co-author of reports on whether the DLS should receive provisional accreditation. All three alleged statements at issue were made by respondent in his capacity either as inspector or as consultant

and all were related to the matter of whether DLS should be granted provisional accreditation.

This Court and others have consistently held that educational controversies are "public" and persons centrally embroiled in the dispute are "public figures" with the *New York Times* rule, *Pickering v. Board of Education,* 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Kapiloff v. Dunn,* Ct. Sp. App. Md., 343 A. 2d 251 (1975) cert. den'd 426 U. S. 907, 96 S. Ct. 2228, 48 L. Ed. 2d 832 (1975) (high school principal); *Basarick v. Rodeghero,* Ill. App., 321 N. E. 2d 739 (1974) (various teachers and athletic coaches); *Gallman v. Carnes,* 254 Ark. 987, 497 S. W. 2d 47 (1973) (assistant dean and law school professor's "qualification as a scholar and professor of law involve matters of public or general concern," p. 50); *Reaves v. Foster,* 200 So. 2d 453 (Miss. 1967) (school principal); *Time, Inc. v. Johnston,* 448 F. 2d 378 (4th Cir. 1971) (college basketball coach); *Grayson v. Curtis Publishing Co.,* 72 Wash. 2d 999, 436 P. 2d 756 (1968) (college basketball coach); *Johnson v. Board of Junior College Dist. #508,* 31 Ill. App. 3d 270, 334 N. E. 2d 442 (1975) (college faculty member).

The alleged statement for which a new trial is ordered took place at a luncheon involving four persons, Avins, White, DiBona and Assistant Dean Tovey. Although this type of setting may not be considered traditional "media," the subject of the meeting was the DLS accreditation struggle. However, *New York Times* is a rule of constitutional protection. This Court and others have held that educational matters are sufficiently important that comments thereon, even private comments, are constitutionally protected; *Givhan v. Western Consolidated School District,* 439 U. S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979); *Stone v. Board of Regents University System,* 620 F. 2d 526, 528, ftn. 3 (5th Cir. 1980).

**The Third Circuit's Application of the New York Times Rule in Matters Involving Law School Accreditation Is Consistent With This and Other Courts' Decisions Recognizing the Societal Importance of Educational Matters.**

Petitioner first argues (PB21-23) that the Court of Appeals extension of the *New York Times* rule into matters of confidentiality warrants review. In fact, there was no per se extension of the *New York Times* rule into areas of confidentiality without real public interest.[4] It was comments germane to the accreditation process that were entitled to *New York Times* protection:

> "We believe the importance of the accreditation process underscores the need for extension of the *New York Times* privilege to a private individual criticizing a public figure in the course of commenting on matters germane to accreditation. An accreditation evaluation by its nature is critical; the applicant school invites critical comments in seeking accreditation. In order to succeed, individuals involved in the accreditation process need to be assured that they may frankly and openly discuss accreditation matters. White, in criticizing Avins at the luncheon, was expressing a candid view of Avins' conduct during the accreditation process. To require an individual like White to insure the accuracy of his comments on accreditation matters would undoubtedly lead to self-censorship which will jeopardize the efficacy and integrity of the accreditation process itself. Since the public is vitally affected by accreditation of educational institutions, we believe that self-censorship in the accreditation process would detrimentally affect

4. The Third Circuit took pains to avoid extending the *New York Times* rule to all confidential communications (Slip op., p. 23, ftn. 5).

> an area of significant social importance." (Slip op., p. 21)

It is the social importance of the accreditation process that provides the basis for applying the *New York Times* rule. In that regard, the Third Circuit's opinion merely follows this and other courts' decisions recognizing the importance of educational matters, *Pickering v. Board of Education, supra; Kapiloff v. Dunn, supra; Basarick v. Rodeghero, supra; Gallman v. Carnes, supra; Reaves v. Foster, supra; Time, Inc. v. Johnston, supra; Grayson v. Curtis Publishing Co., supra; Johnson v. Board of Junior College Dist. #508, supra.* By focusing its holding on educational matters, the court below does not threaten the business and private confidences petitioner seeks to protect (PB22).

Petitioner cites *Snepp v. United States,* — U. S. —, 100 S. Ct. 763, 62 L. Ed. 2d 704 (1980) petition for reh. den'd — U. S. —, 100 S. Ct. 1668, 64 L. Ed. 2d 250 (1980) (PB22). Snepp, an ex-CIA agent, breached his signed employment agreement that he would agree to CIA review of any material he sought to publish about his activities. When Snepp published his book on his activities in Vietnam, the government sought to impose a constructive trust upon the profits of his book to deter future information leaks. The principal distinguishing aspect of *Snepp v. United States, supra,* is stated in footnote 3 where the Court noted:

> "The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign services . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest."

The distinction is patent. White was acting on behalf of an organization charged with an important societal function—the accreditation of law schools. Snepp acted on behalf of himself, was motivated by profits and risked the exposure of national security information.

**The Third Circuit's Findings That the Accreditation Struggle Was a "Public Concern" and That Petitioner's Role Therein Made Him a "Public Figure" Is Amply Supported by the Record and Consistent With This and Other Courts' Prior Holdings That Educational Matters Are "Public Concerns" and Persons Embroiled Therein "Public Figures."**

Petitioner argues (PB23-25) that the ruling below is an extension of the *New York Times* rule into all controversies arising out of license applications. DLS' application for accreditation as such was merely a formal, mechanical step which began the public controversy of its accreditation struggle. It is not the accreditation applications as such which make the *New York Times* rule applicable but the years-long public controversy concerning them into which petitioner injected himself. The application of *New York Times* followed the application of the two-part *Gertz* test by considering:

> ". . . whether (1) the DLS accreditation struggle was a public controversy and (2) if so, whether Avins voluntarily injected himself into that controversy." (Slip op., p. 19)

In holding that the DLS accreditation struggle was a public controversy, the Third Circuit relied on these facts:

> "Although DLS was formed and operated as a purely private law school, its success or failure was of importance to the Delaware State Bar as well as to any individual interested in attending an ac-

credited law school in Delaware. It is the only law school in the State of Delaware. Accreditation of DLS would create a new source of attorneys who could qualify to take the Delaware Bar examinations and be admitted to practice in the state. Furthermore, a majority of DLS students were from out of state. Thus, DLS' accreditation would also affect the interests of students from a variety of locales and admission to State Bars outside of Delaware.

Further, there is evidence in the record that mass meetings were held and that individuals from other states concerned about DLS visited the school. The local news media, as well as the Delaware Bar Association, publicized the events surrounding DLS' formation and struggle for accreditation." (Slip op., p. 19)

The ruling is consistent with the previously cited cases holding educational matters to be public controversies.

In finding that Avins was a "public figure" in the accreditation struggle, the Third Circuit relied on these facts:

"We have no difficulty in concluding that Avins voluntarily injected himself into the controversy surrounding DLS' accreditation. As creator, chief architect, and the first dean of DLS, Avins spearheaded its drive toward accreditation. Indeed, the first major hurdle which Avins had to surmount in behalf of DLS was accreditation. The record reveals that from the outset Avins, as dean, was actively involved in every facet of the accreditation struggle. He, in fact, invited the first three accreditation teams to inspect DLS and he personally presented DLS' case before the Council and Accreditation Committee. Unlike the plaintiffs in Firestone, supra, Hutchinson, supra, and Wolston, supra, Avins was not involun-

> tarily dragged into a controversy not of his own making. It was Avins who as dean of DLS officially requested, invited, and affirmatively invoked the accreditation process of the American Bar Association. We therefore conclude that Avins played an affirmative and aggressive role in the accreditation process and that he was a public figure for that limited purpose." (Slip op., p. 20)

Here, the application for accreditation is considered. However, as the court noted, it was one part in petitioner's constant effort to inject himself into every facet of the accreditation controversy. If there is anything in this case which is beyond dispute, it is petitioner's active and central role at DLS during the accreditation struggle. He clearly "invite[d] attention and comment," *Gertz, supra,* 418 U. S. at 345, 94 S. Ct. at 3009, to himself. As such, he was held to be a public figure—a holding consistent with the previously cited cases holding educational matters to be public controversies and the persons involved limited public figures.

The conclusions by the Third Circuit that the accreditation struggle was a "public concern" and Avins a "public figure" are fully supported in the record.[5]

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5. At trial, petitioner himself noted the many meetings called to discuss his role. He testified ". . . there were other mass meetings, small meetings, big meetings, little meetings, people came from New York to talk to me . . ." (F83). Newspaper articles concerning "Avins Law School" appeared (F87, 89).

Petitioner's claim that he is not a public figure is inconsistent with his own activities. In *Avins v. Widener College,* 421 F. Supp. 858 (D. Del. 1976). He sought to require Widener College to honor a September 8, 1974, board of trustees resolution which, referring to Delaware Law School, would have required designation of the library as the "Dean Alfred Avins Law Library," designation of the main classroom building as "Avins Hall" with an appropriate plaque or other exhibition and a formal portrait of him

Viewed in this context, the cases relied on by petitioner are distinguishable and were distinguished by the Third Circuit to the extent the petitioner cited them to it (Slip op., pp. 17-18). In *Hutchinson v. Proxmire,* 443 U. S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979), there was ridiculing comment concerning a behavioral scientist's laboratory research on the emotional behavior of primates. The research was not secret or something that plaintiff would wish to keep from the public, but he made no effort to publicize the research or in any way gain attention for it. The comment ridiculing the research was without any approval or cooperation on the part of the plaintiff. Here, petitioner initiated the accreditation proceedings and inspections and repeatedly and pointedly focused attention upon himself as the center of the struggle.

*Time, Inc. v. Firestone,* 424 U. S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976) involved an article describing the extra-marital affairs of respondent and her husband as revealed in divorce litigation. The offending statements were based on matters considered highly personal and private to the plaintiff and would have gone unpublicized except for the intervention of the defendant. In *Firestone,* both the matter disclosed and commented upon as well as the entire underlying divorce litigation was a subject which the plaintiff would have preferred to remain unknown. Here, exactly the opposite situation prevails. DLS' accreditation struggle was a most public matter, as was petitioner's ongoing determination to be and to remain DLS' central figure.

Petitioner relies on *Dixson v. Newsweek, Inc.,* 562 F. 2d 626 (10th Cir. 1977). Dixson, prior to being fired

5. (Cont'd.)

to be displayed at the school, 421 F. Supp. at 859, ftn. 2. Private persons, within the meaning of the Supreme Court's ruling, do not seek judicial redress when they do not receive the public acknowledgment they demand.

by new management, was Scheduling Vice-President of Frontier Airlines, a regional carrier based in Colorado. An article in Newsweek Magazine about the financial turnaround of Frontier Airlines portrayed Dixson as, at the very least, an incompetent business executive. Dixson had made no effort to gain public attention from his work. Dixson, therefore, had a non-public plaintiff status similar to that of the plaintiff in *Hutchinson v. Proxmire, supra.*

**The Third Circuit's Application of the New York Times Rule to a Private Comment on Educational Matters Does Not Conflict With Prior Rulings Refusing to Apply the New York Times Ruling to Credit Reports.**

Petitioner next argues (PB25-28) that application of the *New York Times* rule to a private comment requires review. His argument is structured as follows: (1) Credit reports are matters of public concern (PB26); (2) however, other courts refuse to apply *New York Times* to credit reports; and (3) thus, a conflict exists among the circuit courts warranting review (PB28).

Petitioner's argument fails at its very beginning. Financial credit reports are not matters of public concern, as held by the very cases he cites, *Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc.*, 448 F. 2d 647 (10th Cir. 1971) (financial reports are not a matter of "real public interest," p. 649); *Hood v. Dun & Bradstreet,* 486 F. 2d 25 (5th Cir. 1973) (credit reports do not fall within the definitions of matters of general or public interest, p. 30); *Grove v. Dun & Bradstreet,* 438 F. 2d 433 (3rd Cir. 1971) cert. den'd 404 U. S. 898, 92 S. Ct. 204, 30 L. Ed. 2d 175 (1971) (credit reports not a matter of "real public interest," p. 436); *Harley-Davidson Motorsports v. Markley,* 568 P. 2d 1359 (1977) (forged customer complaint letter sent to corporate headquarters involved no public figure as plaintiff and no issue of public concern and no media defendant, p. 1362).

Petitioner cites *Mid-America Food Service v. ARA Services, Inc.*, 578 F. 2d 691 (8th Cir. 1978) (PB27, 35) although it actually supports respondent's position. Petitioner specifically cites footnote 5 at page 697. There, the Eighth Circuit noted that in any defamation case without media involvement the court must engage itself in a "*Gertz*" type balancing before the *New York Times* rule can be applied. This is exactly what the Third Circuit did below in considering first whether the DLS accreditation struggle was a public controversy and second if Avins voluntarily injected himself into that controversy (Slip op., p. 19).

The Third Circuit carefully distinguished the instant case from credit report situations (Slip op., p. 23, ftn. 5):

> "We do not believe that our decision today conflicts with Grove v. Dun & Bradstreet,, Inc., 438 F. 2d 433 (3d Cir.) *cert. denied,* 404 U. S. 898 (1971). In *Grove,* a corporation brought a libel action against the defendant who had issued an allegedly false credit report to its subscribers. We held that the *New York Times* privilege did not apply to the dissemination of a private credit report. *Grove,* however is distinguishable from the present case. In *Grove* we held under the pre-*Gertz* test of public figure status as involving a matter of legitimate public concern, Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 (3d Cir. 1969) *aff'd,* 403 U. S. 29 (1971), plaintiff's business or credit standing was not a matter of real public interest. See 438 F. 2d at 436-37. In the instant case, we have concluded that the DLS accreditation struggle was a public controversy.
>
> In *Grove,* we also indicated that the medium in which the defamatory statement was communicated—a private subscription credit reporting service—did not entitle the defendant to the *New York Times*

privilege. See 438 F. 2d at 437. This language is arguably dicta and may be limited to the situation of commercial credit reports. *See generally* Hood v. Dun & Bradstreet, 486 F. 2d 25, 29 (5th Cir. 1973), *cert. denied*, 415 U. S. 985 (1974). Even if this language is not dicta, we believe *Grove* is nonetheless distinguishable. The subscribers to the credit reports had only a generalized interest in the defendant's report on the plaintiff corporation whereas in the instant case, all those present at the luncheon had a vital interest in the accreditation controversy. Thus, the forum in the instant case militates in favor of application of the *New York Times* privilege to insure that discussion be robust and uninhibited."

As made clear by the last sentence of the above quote, the entire thrust of the application of *New York Times* here is to foster discussion among interested persons on matters of societal importance. As such, the ruling below conflicts with no prior ruling of any court.

In *Doman v. Rosner*, Pa. Super., 371 A. 2d 1002 (1977), the directors of a medical institute sued an organization preparing an unfavorable report of it and them. Noting the societal importance of the institute, the *New York Times* rule was applied even though the report in question was private.

In providing constitutional protection to comments made in a small group under the circumstances here, the Third Circuit's ruling simply applied the *New York Times* decisions involving public educational controversies [6] and

6. *Pickering v. Board of Education, supra; Kapiloff v. Dunn, supra; Basarick v. Rodeghero, supra; Gallman v. Carnes, supra; Reaves v. Foster, supra; Time, Inc. v. Johnston, supra; Grayson v. Curtis Publishing Co., supra; Johnson v. Board of Junior College Dist. #508, supra.*

those decisions affording constitutional protection to private comments on educational affairs.[7]

The Circuit Courts are in accord that classroom discussion is sufficiently important to be a constitutionally protected activity, *Kingsville Independent School District v. Cooper,* 611 F. 2d 1109, 1113 (5th Cir. 1980); *Minarcini v. Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Keefe v. Geanakos,* 418 F. 2d 359 (1st Cir. 1969). It would be anomalous if the courts held that classroom discussion is entitled to constitutional protection but a person charged with the societal duty of determining whether that classroom discussion is of sufficiently high caliber to warrant accreditation is not afforded similar protection—regardless of the forum of the discussion.

**The Third Circuit's Characterization of Certain Allegedly Defamatory Comments as Opinion Is Consistent With This and Other Courts' Holdings on What Constitutes an Opinion and the Constitutional Protection Afforded Opinions.**

Petitioner next argues (PB28-30) that an important question is presented by the application of the *Gertz* opinion rule to intangible evaluations in accreditation reports. This Court has already held that opinions are constitutionally protected, *Gertz v. Robert Welch, supra,* 418 U. S. at 339-340, 94 S. Ct. at 3007:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas."

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7. *Givhan v. Western Consolidated School District, supra; Stone v. Board of Regents University System, supra.*

Petitioner challenges the proposition that an "intangible criterion" is an "opinion" because there was testimony that the offending statement lowered the witness' estimation of petitioner (PB29). The argument is a non sequitur. Opinions are supposed to create reactions in the reader, *Kapiloff v. Dunn, supra* at 260.

Petitioner asserts "intangible evaluations" are "routinely" held actionable, citing *Arctic Co. Ltd. v. Loudon Times-Mirror,* 624 F. 2d 518 (4th Cir. 1980) (PB29). Simply put, *Arctic* did no such thing. Arctic Co. was not a "public official" or a "public figure." *Arctic* supports the Third Circuit in measuring a "public" figure by whether it was well known in the community and whether it did "press itself" into the controversy. No person was better known in DLS and the accreditation effort than Avins, and no person pressed himself more eagerly into the controversy.

"Intangible" evaluations or criteria such as "fascist," "fellow traveler" or the like are non-actionable opinions, *Buckley v. Littell,* 539 F. 2d 882, 893 (2d Cir. 1976) cert. den'd 429 U. S. 1026, 97 S. Ct. 785, 50 L. Ed. 2d 777 (1977).

Petitioner asserts that the reports were not subject to "correction" by public debate. This is irrelevant with reference to opinions. In any event, before the Council voted on approval, Avins, as dean, had the opportunity to "correct" the reports and availed himself of this opportunity extensively (F40-42, 67-70). Similarly, Weeks addressed the ABA when the third report was considered (L24, 25) and, most importantly, it was Weeks' opportunity to comment on the fourth report which resulted in the Council's reversal of its own Accreditation Committee's recommendation and the granting of provisional accreditation to DLS.

**The Third Circuit Did Not Invade the Province of the Jury in That It Only Held That Certain Matters Were, as a Matter of Law, Not for Jury Consideration. No Finding of Fact Contrary to the Jury Was Made.**

Petitioner next argues (PB31-32) that the facts constitute sufficient evidence to support a jury verdict and, accordingly, the Court of Appeals' reversal was an invasion of the jury's province.

The Third Circuit reversed the jury's verdict because the first and second defamation claims were held to be non-actionable opinions that should not have been submitted to the jury (Slip op., pp. 9-10). There is no "province" to invade when the jury should not have been allowed to consider the question in the first place. In defamation cases, the appellate court must "make an independent examination of the whole record" to decide for itself whether there was a statement the Constitution protects, *New York Times v. Sullivan, supra, Buckley v. Littell, supra.*

Petitioner's authorities *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Inc.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), *reh. den.* 369 U. S. 882, 82 S. Ct. 1134, 8 L. Ed. 2d 284 (1962) and *Dennis v. Denver & R. G. W. R. Co.*, 375 U. S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963) are negligence actions. As such, the appellate court's duty is to search the record for evidence which may support the verdict.

**The Third Circuit's Alleged Sub Silentio Ruling Regarding F. R. C. P. 51 Is Consistent With Holdings in the Other Circuits That Objections Are Not Waived When a Party's Position Has Been Consistent Throughout the Entire Course of Litigation and Further Objection Would Have Been Unavailing.**

Petitioner contends that a question of construction of F. R. C. P. 51 requires the consideration of this Court (PB33-35). The respondent had moved for summary judgment prior to the trial and for a directed verdict at the end of the petitioner's case (I5), as well as at the end of the evidence (N135). It had been at all times and remains the respondent's position that nothing said or written by the respondent at any time defamed the petitioner. It was not the understanding of respondent's counsel that these points already made by the respondent and rejected by the court needed to be restated in the course of the conference on jury instructions. The same was true with reference to the intentional interference claim and the mental distress claim. It was the understanding of respondent's counsel that the conference was concerned with phraseology and statements of legal principles, not with the question of whether specific issues should be submitted to the jury. It was for this reason that counsel, in the course of the conference, reserved the issue of the quantity of proof required to recover on the defamation claim [8] while not discussing the question of whether specific items of alleged defamation should be submitted. Respondent's counsel had already made clear they considered none of them to be defamation.

The discussion in chambers on the court's instructions concerning the charges of defamation, while it may in retrospect appear obscure, can be understood in terms of

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8. The *New York Times v. Sullivan, supra,* matter.

the litigation background of the defamation claim and the preparation of the instructions on the claim (N140-1).

Petitioner's answers to respondent's interrogatories (Docket Nos. 15 and 16) [9] show a vast quantity of contentions on the part of the petitioner concerning the specific instances of alleged defamation including 15 writings and a general statement of "numerous" conversations slandering petitioner (not including the luncheon). It was as to all of these contentions that the respondent moved for summary judgment. The denial of the summary judgment motion did not discuss any of the facts or limit the defamation claim in any way. In the District Court's letter of February 1, 1978, the court was careful to note that it did not intend to foreclose any tender of evidence of defamation at the pre-trial conference or trial ( AV, IV, b5-6). Petitioner's proposed pre-trial order (Docket No. 83) did not narrow the defamation claims from the large quantity of such claims identified in the answers to interrogatories. Although the District Court said there "was not much of a pre-trial order" (N141), actually there was none at all. The petitioner's proposed instructions on defamation did not identify any statements alleged to be defamatory but proposed simply to instruct on the applicable law. Although the court referred to the pre-trial conference in connection with the charges, there was no order of any kind that there was any limitation on the defamation charges and respondent's counsel had, and have, no recollection of any such understanding. In short, up to the beginning of trial, nothing in the court's rulings, or the contentions by the petitioner gave any indication that the court would limit the petitioner's contentions concerning defamation in any way at all.

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9. Docket No. refers to the docket in the U. S. District Court for the District of Delaware, *Avins v. White*, C. A. 76-134.

The petitioner's opening statement identified certain areas of alleged defamation including specific parts of the January, 1974, report and also, not previously noted by the court in the February 1 letter, parts of the January, 1975, report and the luncheon incident. Since the court had already ruled it would not limit the defamation claims petitioner might make at trial, it seemed apparent that any defamation claim petitioner wanted to assert would be before the jury. At least respondent's counsel could not assume that the court would limit the defamation claims to those mentioned by the petitioner in his opening. Nothing in the entire course of the proceedings to that point indicated that they would be so limited. Nothing in the petitioner's proposed instructions indicated that he considered the claims to be limited by his opening remarks.

In the final conference on jury instructions it appeared that the court, unrequested by either party to do so, would instruct on three specifically identified occasions of alleged defamation. Until that time, there was no indication that the court would identify specifically the instances of alleged defamation. The petitioner had chosen not to limit his proposed defamation instruction in that manner and, since the respondent did not believe that there were any instances of defamation in any of the statements made by respondent, there was no logical basis on which the respondent could identify the allegedly defamatory statements in preparing his instructions.

It is in the context of this background that the respondent's counsel in the discussion of the defamation instructions expressed his agreement that the defamation claims should be limited to those identified by the court (N140-141). It was at least an improvement over the prospect of the petitioner arguing whatever he saw fit as constituting defamation. There was certainly never intended to be any implication of a change in respondent's

position to agree that the specificities identified were in fact allegations of defamatory action on the part of the respondent. Respondent submits that the fact that there had already been unsuccessful motions on three occasions for judgment in his favor (summary judgment and two motions for a directed verdict) clearly shows the respondent's unwavering position that there was no defamation at all. Surely nothing could be more clear than the respondent's position that, whether there was one or twenty alleged acts of defamation, respondent believed that none of them should be submitted to the jury.

The District Court, in rejecting respondent's motion for a new trial, speculated about the thought process of respondent's counsel and the possibility that counsel may have refrained from objecting to one of the allegations of defamation on the ground that they may have wanted to avoid the risk of reversal (AV IV, b49). Since respondent repeatedly requested a directed verdict and previously requested summary judgment, it is submitted that the court's speculation does not attribute to respondent's counsel a logical course. In any event, in view of the court's introduction of its speculation into the opinion, it may be appropriate for respondent's counsel to respond emphatically that there was no such reservation on their part. They believed it was clear throughout that any charge on defamation or on any specificity of alleged defamation was already disputed and objected to and such objection had been overruled.

In discussing Rule 51, it is stated in Wright & Miller, Federal Practice & Procedure, Vol. 9, § 2553, p. 639, that:

> ". . . The failure to object may be disregarded if the party's position has been clearly made to the court and it is plain that a further objection would be unavailing."

To the same effect is *Brown v. Avemco Inv. Corp.*, 603 F. 2d 1367 (9th Cir. 1979); *Robinson v. Heilman*, 563 F. 2d 1304 (9th Cir. 1977); *Stewart v. Ford Motor Co.*, 553 F. 2d 130, 140 (D. C. Cir. 1977); *Ind. Dev. Bd. of Tn. of Section, Ala. v. Fuqua Indus.*, 523 F. 2d 1226 (5th Cir. 1975), reh. den. (1976); *Sweeney v. United Feature Syndicate*, 129 F. 2d 904 (2nd Cir. 1942); 5A Moore's Federal Practice, § 51.04, p. 51-28.

Petitioner's authorities (PB34-35) are distinguishable. In *Rogers v. Baltimore & O. R. R. Co.*, 325 F. 2d 134 (6th Cir. 1963), the court removed one of plaintiff's key issues from the jury's consideration thereby significantly altering the course of the trial. Defendant's failure to object was deemed a waiver. In *Mid-America Food Service v. ARA Services, Inc., supra,* counsel was deemed to have waived his objection on a matter which, during trial, he encouraged and agreed upon. In *Miller v. New York Cent. R. R.*, 293 F. 2d 10 (7th Cir. 1956), the objection raised post-trial concerned a matter never called to the attention of the court during trial.

Here, there were no major court rulings during trial which significantly altered its course, respondent's counsel never encouraged or agreed to the submission of the defamation claims to the jury and constantly made known its complete opposition to the submission of any of the defamation claims to the jury.

**The Third Circuit's Remand for a New Trial Is Consistent With This and Other Courts' Holdings That a New Trial Is Required When a General Verdict Is Based on More Than One Claim, One of Which Has Been Improperly Submitted to the Jury.**

Petitioner next argues (PB35-37) that there is a conflict among the circuits on the issue of whether a general verdict may be reversed when supported by only one valid

claim. He relies on *Buckley v. Littell, supra,* where the court, rather than granting a new trial on the one valid claim, granted a remittitur or ordered a new trial on damages only. However, the *Buckley* court labeled its situation unusual insofar as the relief granted, 539 F. 2d at 896. Other courts routinely hold that general verdicts supported by invalid claims cannot stand.

In *Sunkist Growers v. Winckler & Smith Citrus P. R. Co.,* 370 U. S. 19, 30, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962), this court, citing the earlier case of *Maryland v. Baldwin,* 112 U. S. 490, 493, 5 S. Ct. 278, 28 L. Ed. 822 (1884), stated, with respect to a general verdict which could have been based on either a valid or invalid instruction:

> "It generally prevents from proceeding upon which plea they found. If, therefore, upon any one issue error was committed, either in admission of evidence or in the charge of the court, the verdict cannot be upheld."

This rule has been consistently followed, not only in the Third Circuit, *Rea v. Ford Motor Co.,* 497 F. 2d 577, 591 (3rd Cir. 1974) cert. den'd 419 U. S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 106 (1974), but other Circuits as well,, *Hayes v. Solomon,* 597 F. 2d 958, 985 (5th Cir. 1979); *Russell v. City Ice & Fuel Co.,* 539 F. 2d 1318, 1321 (4th Cir. 1976).

**The Third Circuit Correctly Upheld the Jury's Verdict on the Interference Claim Since the Trial Court's Instructions on Proximate Cause Would Not Result in a Unique Verdict Which Might Differ From State to State.**

Petitioner finally argues (PB38-39) that an undecided question exists on what proximate cause elements are

necessary for tort denial of constitutional rights, relying on *Carlson v. Green*, — U. S. —, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). *Carlson* held that if an action is based on federal law then, to the extent state statutes would result in different results (abate or non-abatement of action depending on wording of state survival statute), federal common law, not state law, would apply. Even assuming petitioner is correct that his tort action is based on federal law, the causation instruction [10] given by the trial court is not contrary to any federal law nor will it lead to different results from state to state. Accordingly, state law is properly applied, *Farmer v. United Broth. of C. & J. of America, Local 25*, 430 U. S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977).

## CONCLUSION

For the foregoing reasons, respondent requests that this Court deny a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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10. The jury charge on causation (O116-118; AV III, a105-107) is consistent with *Restatement of Torts, 2d*, §§ 622A and 767(f) and comment (h) thereon.